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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1959

No. 466 7

LEON WOLFE, GEORGE SIMKINS, JR., JOSEPH STURDIVENT, ET AL., APPELLANTS,

vs.

STATE OF NORTH CAROLINA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

FILED OCTOBER 22, 1958

JURISDICTION POSTPONED JANUARY 12, 1959

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 466

LEON WOLFE, GEORGE SIMKINS, JR., JOSEPH STURDIVENT, ET AL., APPELLANTS,

vs.

STATE OF NORTH CAROLINA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

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[fol. 1]

IN THE SUPERIOR COURT OF GUILFORD COUNTY
NORTH CAROLINA

STATE

v.

PHILLIP COOKE

STATE

v.

LEON WOLFE

STATE

v.

GEORGE SIMKINS, JR.

STATE

v.

JOSEPH STURDIVENT

STATE

v.

SAMUEL MURRAY

STATE

v.

ELIJAH H. HERRING

Before Fountain, Special J., February 3, 1958, Criminal Term, Guilford Superior Court (Greensboro Division).
Defendants Appealed.

ORGANIZATION OF COURT

Be It Remembered that on Monday, February 3, 1958, was begun and holden a two-weeks regular term of the Superior Court of Guilford County, North Carolina, [fol. 2] (Greensboro Division) for the trial of Criminal cases. Honorable George M. Fountain, Tarboro, N. C., Judge Presiding; Honorable Horace R. Kornegay, Greensboro, N.C., Solicitor; Honorable Claude K. Josey, Greensboro, N. C., Assistant Solicitor. Mrs. Billie Boyle, Court Reporter.

(Commission to Judge Fountain, one of the Special Judges of the Superior Courts, to hold said term of Court appears in original transcript of record.)

Affidavit, Warrant for Arrest, Bond and Judgment (Cooke Case)

IN THE MUNICIPAL-COUNTY COURT

CRIMINAL DIVISION

No. 19679

STATE OF NORTH CAROLINA

v.

PHILIP COOKE

AFFIDAVIT

Ernest Edwards, being duly sworn, deposes and says that Philip Cooke, on or about the 7 day of December, 1955, with force and arms, at and in Guilford County, except High Point, Deep River and Jamestown townships, did unlawfully and willfully enter and trespass upon the premises of Gillespie Park Club, Inc., after having been forbidden to enter said premises, and not having a license to enter said premises at Troy Street, Greensboro, North

Carolina, against the statute in such case made and provided and against the peace and dignity of the State and in violation of City Ordinance, Chapter ....., Section .....

/s/ Ernest Edwards

Sworn to and subscribed before me, this the 2 day of December, 1957. /s/ C. Stephenson, Asst. Clerk of the Municipal-County Court.

IN THE MUNICIPAL-COUNTY COURT
CRIMINAL DIVISION

[fol. 3]

STATE OF NORTH CAROLINA

v.

PHILIP COOKE

WARRANT FOR ARREST

To the Chief of Police of the City of Greensboro, the Sheriff of Guilford County, or other lawful officer, Greeting:

For the reasons stated in the foregoing affidavit, which is hereby made a part of this warrant, you are hereby commanded forthwith to arrest the said Philip Cooke and him have before his Honor, the judge of the Municipal-County Court, City Hall, Greensboro, North Carolina, then and there to answer said charges and be dealt with according to law.

Witness my hand, this the 2 day of December, 1957.

John W. Kinsey, Clerk, Municipal-County Court, By /s/ C. Stephenson, Deputy Clerk Asst.

State of North Carolina

To the Chief of Police, or any Policeman of the City of Greensboro or any lawful officer of Guilford County, Greeting:

You are hereby commanded to subpoena as witness for the State in the case of State vs. ....., et al., Ernest Edwards, 508 Willowbrook Dr.
and for the defendant .....
and such other witness as .....
may demand, to appear before the Municipal-County Court, in the City Hall, Greensboro, N. C., on the ..... day of ....., 19....., 9:30 o'clock A.M., and not depart the Court without leave.

This ..... day of ....., 19.....

John W. Kinsey, Clerk, Municipal-County Court.

BOND

We acknowledge ourselves indebted to the State of North Carolina in the sum of $200.00 Two Hundred Dollars and 00/100—Dollars.

The condition of the above recognizance is such that if [fol. 4] Philip Cooke, the defendant above named, shall appear before the Municipal-County Court in the City Hall, Greensboro, N. C., on the 16th day of December, 1957, at 9:30 o'clock A.M., and answer the above named charge, and not depart the Court without leave and shall not depart the Court until he fully complies with the judgment of the Court, then this recognizance to be void, otherwise to remain in full force and effect.

This 2nd day of December, 1957.

/s/ Philip Cooke (Seal)

/s/ George C. Simkins (Seal)

Subscribed before me, the day and year above written.
/s/ C. Stephenson.

North Carolina—Guilford County.

George C. Simkins, 803½ E. Market, one of the subscribers to the above undertaking, being duly sworn, deposes and says: That he is a resident and freeholder in this State, and is worth the sum of $400.00 over and above all his debts, liabilities and real and personal property exempt from execution.

/s/ George C. Simkins

Subscribed and sworn to before me, this the 2nd day of December, 1957. John W. Kinsey, Clerk, Municipal-County Court, By: /s/ C. Stephenson, Deputy Clerk.

Docket No. B 7079
Case No. 7516

Warrant No. 19679 CM.
State A—
Philip Cooke
508 Boyd St

Warrant for Trespassing

Issued 2 day of December, 1957;
Rec'd 2 day of December, 1957;
Exec'd 2 day of December, 1957.
Paul B. Calhoun, Chief of Police.
/s/ M. Bailey Police.

[fol. 5]

JUDGMENT

Plea Not Guilty.

The Court, after hearing all the evidence in the case, adjudges defendant Guilty and imposes the following judgment

State Road		30 days Month
City Hall		
Any County Institution	X	

Fine	$.1
Court Costs	$16.50
Board and Meals	$
Capias	$
Total Court Costs	$17.50

Appeal Rec 6-58.

Deputy Clerk, Municipal-County
Court City of Greensboro, N. C.
$200.00 Bond.

Affidavit, Warrant for Arrest, Bond and Judgment (Wolfe Case)

IN THE MUNICIPAL-COUNTY COURT

CRIMINAL DIVISION

No. 19680

STATE OF NORTH CAROLINA

v.

LEON WOLFE

AFFIDAVIT

Ernest Edwards, being duly sworn, deposes and says that Leon Wolfe, on or about the 7 day of December, 1955, with

force and arms, at and in Guilford County, except High Point, Deep River and Jamestown townships, did unlawfully and willfully enter and trespass upon the premises of Gillespie Park Club, Inc., after having been forbidden to enter said premises, and not having a license to enter said premises at Troy Street, Greensboro, North Carolina, against the statute in such case made and provided and against the peace and dignity of the State and in violation of City Ordinance, Chapter ....., Section .....

/s/ Ernest Edwards

Sworn to and subscribed before me, this the 2 day of December, 1957. /s/ C. Stephenson, Deputy Clerk of the Municipal-County Court Asst.

[fol. 6]

IN THE MUNICIPAL-COUNTY COURT

CRIMINAL DIVISION

STATE OF NORTH CAROLINA

v.

LEON WOLFE

WARRANT FOR ARREST

To the Chief of Police of the City of Greensboro, the Sheriff of Guilford County, or other lawful officer, Greeting:

For the reasons stated in the foregoing affidavit, which is hereby made a part of this warrant, you are hereby commanded forthwith to arrest the said Leon Wolfe and him have before his Honor, the judge of the Municipal-County Court, City Hall, Greensboro, North Carolina, then and there to answer said charges and be dealt with according to law.

Witness my hand, this the 2 day of December, 1957.

John W. Kinsey, Clerk, Municipal-County Court, By: /s/ C. Stephenson, Deputy Clerk, Asst.

State of North Carolina

To the Chief of Police, or any Policeman of the City of Greensboro or any lawful officer of Guilford County, Greeting:

You are hereby commanded to subpoena as witness for the State in the case of State vs. ....., et al., Ernest Edwards, 508 Willowbrook Dr., City
and for the defendant: .....
and such other witness as .....
may demand, to appear before the Municipal-County Court, in the City Hall, Greensboro, N. C., on the ..... day of ....., 19....., 9:30 o'clock A.M., and not depart the Court without leave.

This ..... day of ....., 19.....

John W. Kinsey, Clerk, Municipal-County Court.

[fol. 7]

BOND

We acknowledge ourselves indebted to the State of North Carolina in the sum of $200.00 Two Hundred Dollars and 00/100—Dollars.

The condition of the above recognizance is such that if Leon Wolfe, the defendant above named, shall appear before the Municipal-County Court in the City Hall, Greensboro, N. C., on the 16th day of December, 1957, at 9:30 o'clock A.M., and answer the above named charge, and not depart the Court without leave and shall not depart the Court until he fully complies with the judgment of the Court, then this recognizance to be void, otherwise to remain in full force and effect.

This 2nd day of December, 1957.

/s/ Leon Wolfe Seal

/s/ George C. Simkins Seal

Subscribed before me, the day and year above written.
/s/ C. Stephenson.

North Carolina—Guilford County.

George C. Simkins, 803½ E. Market Street, one of the subscribers to the above undertaking, being duly sworn, deposes and says: That he is a resident and freeholder in this State, and is worth the sum of $400.00 over and above all his debts, liabilities and real and personal property exempt from execution.

/s/ George C. Simkins

Subscribed and sworn to before me, this the 2nd day of December, 1957. John W. Kinsey, Clerk, Municipal-County Court, By: /s/ C. Stephenson, Deputy Clerk.

12-16-57

Docket No. B 7080
Case No. 75616

Warrant No. 19680 A CM

State A—
LEON WOLFE
Warrant for Trespassing

[fol. 8] Issued 2 day of December, 1957;
Rec'd 2 day of December, 1957;
Exec'd 2 day of December, 1957.
Paul B. Calhoun, Chief of Police.
/s/ M. Bailey, Police.

JUDGMENT

Plea Not Guilty.

The Court, after hearing all the evidence in the case adjudges defendant Guilty and imposes the following judgment:

State Roads 30 days Month
X Any County Institution

Fine	$ 1
Court Costs	$16.50
Board and Meals	$
Capias	$
Total Court Costs	$17.50

Appeal 1-6-58 Rec.

Deputy Clerk, Municipal-County
Court City of Greensboro, N. C.

~~$200 Bond.~~

Affidavit, Warrant for Arrest, Bond and Judgment (Simpkins Case)

IN THE MUNICIPAL-COUNTY COURT

CRIMINAL DIVISION

No. 19681

STATE OF NORTH CAROLINA

v.

GEORGE SIMPKINS, JR.

AFFIDAVIT

Ernest Edwards, being duly sworn, deposes deposes (sic) and says that George Simpkins, Jr., on or about the 7 day of December, 1955, with force and arms, at and in Guilford County, except High Point, Deep River and Jamestown townships, did unlawfully and willfully enter and trespass upon the premises of Gillespie Park Club, Inc., after having been forbidden to enter said premises, and not having a license to enter said premises at Troy Street, Greensboro, North Carolina, against the statute in such case made and [fol. 9] provided and against the peace and dignity of the State and in violation of City Ordinance, Chapter ....., Section .....

/s/ Ernest Edwards

Sworn to and subscribed before me, this the 2 day of December, 1957. /s/ C. Stephenson, Deputy Clerk of the Municipal-County Court Asst.

IN THE MUNICIPAL-COUNTY COURT

CRIMINAL DIVISION

STATE OF NORTH CAROLINA

V.

GEORGE SIMPKINS

WARRANT FOR ARREST

To the Chief of Police of the City of Greensboro, the Sheriff of Guilford County, or other lawful officer, Greeting:

For the reasons stated in the foregoing affidavit, which is hereby made a part of this warrant, you are hereby commanded forthwith to arrest the said George Simpkins, Jr., and him have before his Honor, the judge of the Municipal-County Court, City Hall, Greensboro, North Carolina, then and there to answer said charges and be dealt with according to law.

Witness my hand, this the 2 day of December, 1957.

John W. Kinsey, Clerk, Municipal-County Court, By: C. Stephenson (s), Deputy Clerk Asst.

State of North Carolina

To the Chief of Police, or any Policeman, of the City of Greensboro or any lawful officer of Guilford County, Greeting:

You are hereby commanded to subpoena as witness for the State in the case of State vs. ..... et al., Ernest Edwards, 508 Willowbrook Dr., City, and for the

defendant: ..... and such other witness as ..... may demand, to appear before the Municipal-County Court, in the City Hall, Greensboro, N. C., on the ..... day of ....., 19....., 9:30 {fol. 10} o'clock A.M., and not depart the Court without leave.

This ..... day of ....., 19.....

John W. Kinsey, Clerk, Municipal-County Court.

BOND

We acknowledge ourselves indebted to the State of North Carolina in the sum of $200.00 Two Hundred Dollars and 00/100—Dollars.

The condition of the above recognizance is such that if George C. Simkins, Jr., the defendant above named, shall appear before the Municipal-County Court in the City Hall, Greensboro, N. C., on the 16th day of December, 1957, at 9:30 o'clock A.M., and answer the above named charge, and not depart the Court without leave and shall not depart the Court until he fully complies with the judgment of the Court, then this recognizance to be void, otherwise to remain in full force and effect.

This 2nd day of December, 1957.

/s/ George Simkins, Jr. Seal

/s/ George C. Simkins Seal

Subscribed before me, the day and year above written.
/s/ C. Stephenson.

North Carolina—Guilford County.

George C. Simkins, 803½ E. Market Street, one of the subscribers to the above undertaking, being duly sworn, deposes and says: That he is a resident and freeholder in this State, and is worth the sum of $400.00 over and above all his debts, liabilities and real and personal property exempt from execution.

/s/ George C. Simkins

Subscribed and sworn to before me, this the 2nd day of December, 1957. John W. Kinsey, Clerk, Municipal-County Court, By /s/ C. Stephenson, Deputy Clerk.

12-16-57

Docket No. B 7081
Case No. 75616

Warrant No. 19681

[fol. 11] State A—
George Simpkins, Jr., 215 N Dudley St
Warrant for Trespassing

Issued 2 day of December, 1957;
Rec'd 2 day of December, 1957;
Exc'd 2 day of December, 1957.
PAUL B. CALHOUN, Chief of Police
/s/ B. L. Ferguson, Police.

JUDGMENT

Plea Not Guilty.

The Court, after hearing all the evidence in the case, adjudges the defendant Guilty and imposes the following judgment:

State Roads 30 days Month
X Any County Institution

Fine	$ 1
Court Costs	$16.50
Board and Meals	$
Capias	$
Total Court Costs	$17.50
Appeal Rec	1-6-58

Deputy Clerk, Municipal-County Court City of Greensboro, N. C.
$200.00 Bond.

Affidavit, Warrant for Arrest, Bond and Judgment (Studivent Case)

IN THE MUNICIPAL-COUNTY COURT

CRIMINAL DIVISION

No. 19682

STATE OF NORTH CAROLINA

v.

JOSEPH STUDIVENT

AFFIDAVIT

Ernest Edwards, being duly sworn, deposes and says that Joseph Studivent, on or about the 7 day of December, 1955, with force and arms, at and in Guilford County, except High Point, Deep River and Jamestown townships, did unlawfully and willfully enter and trespass upon the premises of Gillespie Park Club, Inc., after having been forbidden to enter said premises, and not having a license to [fol. 12] enter said premises at Troy Street, Greensboro, North Carolina, against the statute in such case made and provided and against the peace and dignity of the State and in violation of City Ordinance, Chapter ....., Section .....

/s/ Ernest Edwards

Sworn to and subscribed before me, this the 2 day of December, 1957. /s/ C. Stephenson, Deputy Clerk of the Municipal-County Court Asst.

IN THE MUNICIPAL-COUNTY COURT

CRIMINAL DIVISION

STATE OF NORTH CAROLINA

v.

JOSEPH STUDIVENT

WARRANT FOR ARREST

To the Chief of Police of the City of Greensboro, the Sheriff of Guilford County, or other lawful officer, Greeting:

For the reasons stated in the foregoing affidavit, which is hereby made a part of this warrant, you are hereby commanded forthwith to arrest the said Joseph Studivent and him have before his Honor, the judge of the Municipal-County Court, City Hall, Greensboro, North Carolina, then and there to answer said charges and be dealt with according to law.

Witness my hand, this the 2 day of December, 1957.

John W. Kinsey, Clerk, Municipal-County Court, By: /s/ C. Stephenson, Deputy Clerk Asst.

STATE OF NORTH CAROLINA

To the Chief of Police, or any Policeman, of the City of Greensboro or any lawful officer of Guilford County, Greeting:

You are hereby commanded to subpoena as witness for the State in the case of State v. ....., et al., ...: Ernest Edwards, 508 Willowbrook Dr., City, ...

[fol. 13] and for the defendant ..... and such other witness as ..... may demand, to appear before the Municipal-County Court, in the City Hall, Greensboro, N. C., on the ..... day of ....., 19...., 9:30 o'clock A. M., and not depart the Court without leave.

This ..... day of ....., 19.....

John W. Kinsey, Clerk, Municipal County Court.

BOND

We acknowledge ourselves indebted to the State of North Carolina in the sum of $200.00 Two Hundred Dollars and 00/100—Dollars.

The condition of the above recognizance is such that if Joseph Sturdivent, the defendant above named, shall appear before the Municipal-County Court in the City Hall, Greensboro, N. C., on the 16th day of December, 1957, at 9:30 o'clock A. M., and answer the above named charge, and not depart the Court without leave and shall not depart the Court until he fully complies with the judgment of the Court, then this recognizance to be void, otherwise to remain in full force and effect.

This 2nd day of December, 1957.

/s/ Joseph Sturdivent Seal

/s/ George C. Simkins Seal

Subscribed before me, the day and year above written.
/s/ C. Stephenson

North Carolina—Guilford County.

George C. Simkins, 803½ E. Market Street, one of the subscribers to the above undertaking, being duly sworn, deposes and says: That he is a resident and freeholder in this State, and is worth the sum of $400.00 over and above all his debts, liabilities and real and personal property exempt from execution.

/s/ George C. Simkins

Subscribed and sworn to before me, this the 2nd day of December, 1957. John W. Kinsey, Clerk, Municipal-County [fol. 14] Court, By: /s/ C. Stephenson, Deputy Clerk.

12-16-57

Docket No. B 7082
Case No. 75616

Warrant No. 19682

State A—
Joseph Studivent, 220 N Booker St
Warrant for Trespassing

Issued 2 day of December, 1957;
Rec'd 2 day of December, 1957;
Exc'd 2 day of December, 1957.
Paul R. Calhoun, Chief of Police
/s/ B. L. Ferguson, Police.

JUDGMENT

Plea Not Guilty.

The Court, after hearing all the evidence in the case, adjudges defendant Guilty and imposes the following judgment:

State Roads 30 days Month
X Any County Institution

Fine	$ 1
Court Costs	$16.50
Board and Meals	$
Capias	$
Total Court Costs	$17.50

Appeal Rec 1-6-58

Deputy Clerk, Municipal-County
Court, City of Greensboro, N. C.

$200.00 Bond.

Affidavit, Warrant for Arrest, Bond and Judgment (Murray Case)

IN THE MUNICIPAL-COUNTY COURT

CRIMINAL DIVISION

No. 19683

STATE OF NORTH CAROLINA

v.

SAMUEL MURRAY

AFFIDAVIT

Ernest Edwards, being duly sworn, deposes and says [fol. 15] that Samuel Murray, on or about the 7 day of December, 1955, with force and arms, at and in Guilford County, except High Point, Deep River and Jamestown townships, did unlawfully and willfully enter and trespass upon the premises of Gillespie Park Golf Club, Inc., after having been forbidden to enter said premises, and not having a license to enter said premises at Troy Street, Greensboro, North Carolina, against the statute in such case made and provided and against the peace and dignity of the State and in violation of City Ordinance, Chapter ...., Section .....

/s/ Ernest Edwards

Sworn to and subscribed before me, this the 2 day of December, 1957. /s/ C. Stephenson, Deputy Clerk of the Municipal-County Court. Asst.

IN THE MUNICIPAL-COUNTY COURT

CRIMINAL DIVISION

STATE OF NORTH CAROLINA

v.

SAMUEL MURRAY

WARRANT FOR ARREST

To the Chief of Police of the City of Greensboro, the Sheriff of Guilford County, or other lawful officer, Greeting:

For the reasons stated in the foregoing affidavit, which is hereby made a part of this warrant, you are hereby commanded forthwith to arrest the said Samuel Murray and him have before his Honor, the Judge of the Municipal-County Court, City Hall, Greensboro, North Carolina, then and there to answer said charges and be dealt with according to law.

Witness my hand, this the 2 day of December, 1957.

John W. Kinsey, Clerk, Municipal-County Court, By: /s/ C. Stephenson, Deputy Clerk Asst.

State of North Carolina

To the Chief of Police, or any Policeman, of the City of Greensboro or any lawful office, of Guilford County, Greet [fol. 16] ing:

You are hereby commanded to subpoena as witness for the State in the case of State vs. ....., et al., ..., Ernest Edwards, 508 Willowbrook Dr., City, ... and for the defendant ..... and such other witness as ..... may demand, to appear before the Municipal-County Court, in the City Hall, Greensboro, N. C., on the ..... day of ....., 19..., 9:30 o'clock A. M., and not depart the Court without leave.

This ..... day of ....., 19....

John W. Kinsey, Clerk, Municipal-County Court.

Bond

We acknowledge ourselves indebted to the State of North Carolina in the sum of $200.00 Two Hundred Dollars and 00/100—Dollars.

The condition of the above recognizance is such that if Samuel Murray, the defendant above named, shall appear before the Municipal-County Court in the City Hall, Greensboro, N. C., on the 16th day of December, 1957, at 9:30 o'clock A. M., and answer the above named charge, and not depart the Court without leave and shall not depart the Court until he fully complies with the judgment of the Court, then this recognizance to be void, otherwise to remain in full force and effect.

This 2nd day of December, 1957.

/s/ Samuel Murray Seal

/s/ George C. Simkins, Sr. Seal

Subscribed before me, the day and year above written. /s/ C. Stephenson.

North Carolina—Guilford County.

George C. Simkins, Sr., 803½ E. Market Street, one of the subscribers to the above undertaking, being duly sworn, deposes and says: That he is a resident and freeholder in [fol. 17] this State, and is worth the sum of $400.00 over and above all his debts, liabilities and real and personal property exempt from execution.

/s/ George C. Simkins, Sr.

Subscribed and sworn to before me, this the 2nd day of December, 1957. John W. Kinsey, Clerk, Municipal-County Court By: /s/ C. Stephenson, Deputy Clerk.

12-16-57

Docket No. B 7083
Case No. 75616

Warrant No. 19683

State A—
Samuel Murray CM
118 Regan St
Warrant for Trespassing

Issued 2 day of December, 1957
Rec'd 2 day of December, 1957;
Exc'd 2 day of December, 1957.
Paul B. Calhoun, Chief of Police
/s/ B. L. Ferguson, Police.

JUDGMENT

Plea Not Guilty.

The Court, after hearing all the evidence in the case, adjudges defendant Guilty and imposes the following judgment:

State Roads 30 days Month
X Any County Institution

Fine	$ 1
Court Costs	$16.50
Board and Meals	$
Capias	$
Total Court Costs	$17.50

Appeal Rec. 1-6-58

Deputy Clerk, Municipal-County
Court City of Greensboro, N. C.

$200.00 Bond.

[fol. 18]

Affidavit, Warrant for Arrest, Bond and Judgment (Herring Case)

IN THE MUNICIPAL-COUNTY COURT

CRIMINAL DIVISION

No. 19684

STATE OF NORTH CAROLINA

v.

ELIJAH H. HERRING

AFFIDAVIT

Ernest Edwards, being duly sworn, deposes and says that Elijah H. Herring, on or about the 7 day of December, 1955, with force and arms, at and in Guilford County, except High Point, Deep River and Jamestown townships, did unlawfully and willfully enter and trespass upon the premises of Gillespie Park Golf Club, Inc., after having been forbidden to enter said premises, and not having a license to enter said premises at Troy Street, Greensboro, North Carolina, against the statute in such case made and provided and against the peace and dignity of the State and in violation of City Ordinance, Chapter ....., Section .....

/s/ Ernest Edwards

Sworn to and subscribed before me, this the 2 day of December, 1957. /s/ C. Stephenson, Deputy Clerk of the Municipal-County Court, Asst.

IN THE MUNICIPAL-COUNTY COURT

CRIMINAL DIVISION

STATE OF NORTH CAROLINA

v.

ELIJAH H. HERRING

WARRANT FOR ARREST

To the Chief of Police of the City of Greensboro, the Sheriff of Guilford County, or other lawful officer, Greeting:

For the reasons stated in the foregoing affidavit, which is hereby made a part of this warrant, you are hereby commanded forthwith to arrest the said Elijah H. Herring and him have before his Honor, the judge of the Municipal-County Court, City Hall, Greensboro, North Carolina, then and there to answer said charges and be dealt with according to law.

[fol. 19] Witness my hand, this the 2 day of December, 1957.

John W. Kinsey, Clerk, Municipal-County Court By: /s/ C. Stephenson, Deputy Clerk, Asst.

Docket No. B 7084 12-16-57
Case No. 75616

Warrant No. 19684

State A—
vs.
Elijah H. Herring CM 2101 Finley St
Warrant for Trespassing

Issued 2 day of December, 1957;
Rec'd 2 day of December, 1957;
Exe'd 2 day of December, 1957.
Paul B. Calhoun, Chief of Police
M. Bailey, Police.

JUDGMENT

Plea Not Guilty.

The Court, after hearing all the evidence in the case, adjudges defendant Guilty and imposes the following judgment:

State Roads 30 days Month
X Any County Institution

Fine	$ 1
Court Costs	$16.50
Board and Meals	$
Capias	$
Total Court Costs	$17.50

Bond $200.00

Deputy Clerk, Municipal-County
Court City of Greensboro, N. C.
Appeal Rec 1-6-58

BOND

We acknowledge ourselves indebted to the State of North Carolina in the sum of $200.00 Two Humdred Dollars and 00/100 Dollars.

The condition of the above recognizance is such that if Elijah H. Herring, the defendant above named, shall appear before the Municipal-County Court in the City Hall, Greensboro, N. C., on the 16th day of December, 1957, at 9:30 o'clock A. M., and answer the above named charge, [fol. 20] and not depart the Court without leave and shall not depart the Court until he fully complies with the judgment of the Court, then this recognizance to be void, otherwise to remain in full force and effect.

This 2nd day of December, 1957.

/s/ Elijah H. Herring Seal

/s/ George C. Simkins Seal

Subscribed before me, the day and year above written.
/s/ C. Stephenson.

North Carolina--Guilford County:

George C. Simkins, 803½ E. Market Street, one of the subscribers to the above undertaking, being duly sworn, deposes and says: That he is a resident and freeholder in this State, and is worth the sum of $400.00 over and above all his debts, liabilities and real and personal property exempt from execution.

/s/ George C. Simkins

Subscribed and sworn to before me, this the 2nd day of December, 1957. John W. Kinsey, Clerk, Municipal-County Court By: /s/ C. Stephenson, Deputy Clerk.

12-16-57

State of North Carolina

To the Chief of Police, or any Policeman, of the City of Greensboro or any lawful officer of Guilford County.

Greeting:

You are hereby commanded to subpoena as witness for the State in the case of State vs. Elijah H. Herring, et al.,
Ernest Edwards, 508 Willowbrook Dr., City
W. J. Darby, Clyde Bass, 1502 Glenwood Ave.

[fol. 21] and for the defendant:

.....

and such other witness as .....
may demand, to appear before the Municipal-County Court, in the City Hall, Greensboro, N. C., on the ..... day of ....., 19...., 9:30 o'clock A. M., and not depart the Court without leave.

This ..... day of ....., 19.....

John W. Kinsey, Clerk, Municipal-County Court.

[fol. 22]

IN SUPERIOR COURT OF GUILFORD COUNTY

PLEA, JURY AND VERDICT

T. D. 7120, State v. Phillip Cooke, Elijah H. Herring, Samuel Murray, George Simkins, Jr., Joseph Sturdivent, Leon Wolfe—Trespassing.

The defendants are present in Court, each represented by the following Attorneys: William A. Marsh, Esq., of Durham, North Carolina, Harold L. Kennedy and Mrs. Harold L. Kennedy of Winston-Salem, North Carolina, through whom each tenders a plea of Not Guilty. All cases against each defendant are consolidated for the purpose of trial. The following jury was sworn and impaneled, to-wit: C. Clifton Davis and others (naming them).

The Jury returns its Verdict: Guilty as charged in the warrant, as to each defendant individually.

IN SUPERIOR COURT OF GUILFORD COUNTY

JUDGMENT AND APPEAL ENTRIES

Monday Morning, February 10, 1958.

T. D. 7120—State v. Phillip Cooke, Elijah H. Herring, Samuel Murray, George Simpkins, Jr., Joseph Sturdivent, Leon Wolfe—Trespassing.

The defendants are each present in Court with counsel, and having heretofore been convicted, the following judgment is entered:

Phillip Cooke—It is the Judgment of the Court that the defendant be confined in the common jail of Guilford County for a period of fifteen (15) days.

Elijah H. Herring—It is the Judgment of the Court that the defendant be confined in the common jail of Guilford County for a period of fifteen (15) days.

[fol. 23] Samuel Murray—It is the Judgment of the Court that the defendant be confined in the common jail of Guilford County for a period of fifteen (15) days.

George Simkins, Jr.—It is the judgment of the Court that the defendant be confined in the common jail of Guilford County for a period of fifteen (15) days.

Joseph Sturdivent—It is the judgment of the Court that the defendant be confined in the common jail of Guilford County for a period of fifteen (15) days.

Leon Wolfe—It is the Judgment of the Court that the defendant be confined in the common jail of Guilford County for a period of fifteen (15) days.

Appeal Entries

State

v.

Phillip W. Cooke

Upon the rendition of the verdict by the jury, the defendant Phillip W. Cooke, in apt time moves to set the verdict aside and to be granted a new trial, said motion being made because the verdict is contrary to the greater weight of the evidence, because of errors committed during the progress of the trial, and such other errors as have been assigned and also to be assigned. The motion upon each ground is overruled, to which the defendant Phillip W. Cooke in apt time objects and excepts.

Judgment is signed as appears of record. To the signing of which and to the judgment as signed, the defendant Phillip W. Cooke, in apt time, objects, excepts and appeals to the Supreme Court. Notice of appeal is given in open court and further notice waived. The defendant Phillip W. Cooke is allowed 40 days within which to prepare and serve statement of case on appeal. The State of North Carolina, ap- [fol. 24] pellee, is allowed ten days thereafter within which to serve countercase or exceptions. Appearance bond is set in the sum of $200.00. Appeal bond in the sum of $100.00 adjudged sufficient.

This 10th day of February 1958.

George M. Fountain, Judge Presiding.

STATE

v.

GEORGE SIMKINS, JR.

Upon the rendition of the verdic by the jury, the defendant George Simkins, Jr. in apt time moves to set the verdict aside and to be granted a new trial, said motion being made because the verdict is contrary to the greater weight of the evidence, because of errors committed during the progress of the trial, and such other errors as have been assigned and also to be assigned. The motion upon each ground is overruled, to which the defendant George Simkins, Jr. in apt time objects and excepts.

Judgment is signed as appears of record. To the signing of which and to the judgment as signed, the defendant George Simkins, Jr. in apt time objects, excepts and appeals to the Supreme Court. Notice of appeal is given in open court and further notice waived. The defendant George Simkins, Jr. is allowed 40 days within which to prepare and serve statement of case on appeal. The State of North Carolina, appellee, is allowed ten days thereafter within which to serve countercase or exceptions. Appearance Bond is set in the sum of $200.00. Appeal Bond in the sum of $100.00 adjudged sufficient.

George M. Fountain, Judge Presiding.

STATE

v.

ELIJAH HERRING

Upon the rendition of the verdict by the jury, the defen- [fol. 25] dant Elijah Herring in apt time moves to set the verdict aside and to be granted a new trial, said motion being made because the verdict is contrary to the greater weight of the evidence, because of errors committed during the progress of the trial, and such other errors as have been assigned and also to be assigned. The motion

upon each ground is overruled, to which the defendant Elijah Herring in apt time objects and excepts.

Judgment is signed as appears of record. To the signing of which and to the judgment as signed, the defendant Elijah Herring in apt time objects, excepts and appeals to the Supreme Court. Notice of appeal is given in open court and further notice waived. The defendant Elijah Herring is allowed forty days within which to prepare and serve statement of case on appeal. The State of North Carolina, appellee, is allowed ten days thereafter within which to serve countercase or exceptions. Appearance Bond is set in the sum of $200.00. Appeal bond in the sum of $100.00 adjudged sufficient.

This 10th day of February 1958.

George M. Fountain, Judge Presiding.

STATE

v.

LEON WOLFE

Upon the rendition of the verdict by the jury, the defendant Leon Wolfe in apt time moves to set the verdict aside and to be granted a new trial, said motion being made because the verdict is contrary to the greater weight of the evidence, because of errors committed during the progress of the trial, and such other errors as have been assigned and also to be assigned. The motion upon each ground is overruled, to which the defendant Leon Wolfe in apt time objects and excepts.

Judgment is signed as appears of record. To the signing of which and to the judgment as signed, the defendant [fol. 26] Leon Wolfe in apt time objects, excepts and appeals to the Supreme Court. Notice of appeal is given in open court and further notice waived. The defendant Leon Wolfe is allowed forty days within which to prepare and serve statement of case on appeal. The State of North Carolina, appellee, is allowed ten days thereafter within which to serve countercase or exceptions. Appearance

Bond is set in the sum of $200.00. Appeal Bond in the sum of $100.00 adjudged sufficient.

This 10th day of February 1958.

George M. Fountain, Judge Presiding.

STATE

V.

JOSEPH STURDIVENT

Upon the rendition of the verdict by the jury, the defendant Joseph Sturdivent in apt time moves to set the verdict aside and to be granted a new trial, said motion being made because the verdict is contrary to the greater weight of the evidence, because of errors committed during the progress of the trial, and such other errors as have been assigned and also to be assigned. The motion upon each ground is overruled, to which the defendant Joseph Sturdivent in apt time objects and excepts.

Judgment is signed as appears of record. To the signing of which and to the judgment as signed, the defendant Joseph Sturdivent in apt time objects, excepts and appeals to the Supreme Court. Notice of appeal is given in open court and further notice waived. The defendant Joseph Sturdivent is allowed forty days within which to prepare and serve statement of case on appeal. The State of North Carolina, appellee, is allowed ten days thereafter within which to serve counter case or exceptions. Appearance Bond is set in the sum of $200.00. Appeal Bond in the sum of $100.00 adjudged sufficient.

This 10th day of February 1958.

George M. Fountain, Judge Presiding.

[fol. 27]

STATE

v.

SAMUEL MURRAY

Upon the rendition of the verdict by the jury, the defendant Samuel Murray in apt time moves to set the verdict aside and to be granted a new trial, said motion being made because the verdict is contrary to the greater weight of the evidence, because of errors committed during the progress of the trial, and such other errors as have been assigned and also to be assigned. The Motion upon each ground is overruled, to which the defendant Samuel Murray in apt time objects and excepts.

Judgment is signed as appears of record. To the signing of which and to the judgment as signed, the defendant Samuel Murray in apt time objects, excepts and appeals to the Supreme Court. Notice of appeal is given in open court and further notice waived. The defendant Samuel Murray is allowed forty days within which to prepare and serve statement of case on appeal. The State of North Carolina, appellee, is allowed ten days thereafter within which to serve countercase or exceptions. Appearance Bond is set in the sum of $200.00. Appeal Bond in the sum of $100.00 adjudged sufficient.

This 10th day of February, 1958.

George M. Fountain, Judge Presiding.

IN SUPERIOR COURT OF GUILFORD COUNTY

STATEMENT OF THE CASE ON APPEAL

This is a criminal trial on warrants charging the defendants with entering and trespassing upon the land of another, without license, having been forbidden to do so. The cases have been consolidated for trial; said warrants appearing in the record proper. The cases were tried February 6th, 7th and 10th 1958, before his Honor George M. [fol. 28] Fountain, the Judge presiding at the Criminal

Term of Superior Court of Guilford County, North Carolina, and the jury, and the following proceedings were had.

Appearances:

For the State: Hon. Horace R. Kornegay, Solicitor; Hon. Claude K. Josey, Assistant Solicitor.

For the Defendants: William A. Marsh, Jr., C. O. Pearson, Annie Brown Kennedy and Harold L. Kennedy.

Exception No. 1:

When these defendants, and each of them, were called and requested to plead to the charges as set forth in the warrant, the following Motion was made on behalf of each defendant and all of them. The Motion to Quash was first made in the County Municipal Court in Greensboro when the cases were called December 16, 1957, before any plea was entered by any of the defendants herein.

Mr. Kennedy: Motion to Quash Warrants:

IN SUPERIOR COURT OF GUILFORD COUNTY

MOTION TO QUASH

Now come the defendants, and each of them all being Negro citizens of Greensboro, North Carolina, through counsel, and make the following Motion:

That the warrants in the above-entitled cause charging these defendants, and each of them with simple trespass based on GS 14-134 be quashed for the reason that GS 14-134 is hereby being unconstitutionally applied to these defendants, on the following grounds:

1. The State of North Carolina in this prosecution is, contrary to the Supremacy Clause of the United States Constitution, attempting to make a crime out of specific [fol. 29] acts and conduct which both the United States District Court for the Middle District of North Carolina and the United States Court of Appeals for the Fourth

Circuit have specifically held to be protected by the Fourteenth Amendment to the Constitution of the United States. In support of this assertion the defendants show to the Court the following:

(a) Based upon the specific facts and conduct alleged by the State to be a crime in this case, these defendants brought Civil Action No. 1058 in the United States District Court for the Middle District of North Carolina, praying for a declaratory judgment and a decree enjoining the prosecution witnesses and the City of Greensboro and the Greensboro City Board of Education from interfering with the defendants and all other Negroes similarly situated from playing golf on the Gillespie Park Golf Course.

(b) A full hearing was held before United States District Judge Johnson J. Hayes, who on April 24, 1957, found specifically that the prosecuting witnesses and the City of Greensboro had refused to permit these defendants to play golf "primarily because of their color" (Finding of Fact #33), and concluded as a matter of law that these defendants "and other Negroes similarly situated cannot be denied on account of race, the equal privileges to the park, notwithstanding the lease." In addition to his Findings of Fact and Conclusion of Law, Judge Hayes filed an opinion in the case and entered a "decree and injunction" enjoining the prosecuting witnesses and the City of Greensboro and the Greensboro City Board of Education from interfering with these defendants in playing golf on the Gillespie Park Golf Course. The prosecuting witnesses and the City of Greensboro appealed and this decree was subsequently affirmed by the United States Court of Appeals for the Fourth Circuit.

[fol. 30] (c) These defendants have subpoenaed the Clerk of the United States District Court for the Middle District of North Carolina to bring to this trial the full record and judgment roll in said case and respectfully request an opportunity to offer this evidence upon the hearing of this motion.

(d) Defendants respectfully urge the Court to receive and consider the record and judgment roll in the Federal case and after such consideration to estop the State and the

prosecuting witnesses from proceeding further with this prosecution. To permit this prosecution to proceed would be in effect to nullify and render ineffectual the judgment and decree of the United States Courts contrary to the Supremacy Clause of the United States Constitution and such prosecution would violate the rights of these defendants and laws of the United States, including the Fourteenth Amendment.

2. Defendants further show to the Court that there is now pending in the Superior Court of Guilford County an indictment by the Grand Jury charging the same identical crime to which the defendants are charged in this action. In this connection, defendants respectfully show to the Court that these defendants were tried once before on these identical facts and convicted and judgment was arrested by the Supreme Court of North Carolina in *State* v. *Cooke*, 246 NC 518 and that the Supreme Court held the following with regard to any further prosecution: "Defendants may, of course, now be tried under the original warrants since the Court was without authority to allow the Amendment changing the crime charged; *or they may be tried on bills found in the Superior Court for the crime attempted to be charged by the amendment.*" (Emphasis added)

Defendants respectfully urge that these methods of pro-[fol. 31] cedure laid down by the Supreme Court are the only methods of procedure and the State undertook to proceed by following the second alternative, i.e., having indictments found in the Superior Court, that when the case was called for trial, the Solicitor took a nol pros with leave, which in effect continues the case in this Court. *State* v. *Smith*, 129 NC 546, *State* v. *Williams*, 151 NC 660. Because of the pendency of the indictments defendants submit that the warrants should be quashed.

Defendants further respectfully submit that the procedure taken by the prosecution in drawing new warrants was not authorized by the Supreme Court when it arrested judgment in the former case and for this reason these warrants should be quashed.

3. Defendants further urge the Court to quash the warrants in this case for the reason that to require the defendants to stand trial upon these warrants would be to place these defendants in double jeopardy of their liberty in violation of the Fifth Amendment to the Constitution of the United States as incorporated into the Fourteenth Amendment to the Constitution insofar as basic liberties are concerned. In the recent case of *Green* v. *United States*, 355 US ...., 2 LEd 199, decided December 16, 1957, Mr. Justice Black, speaking for the Supreme Court of the United States said:

"The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as [fol. 32] enhancing the possibility that even though innocent he may be found guilty."

There can be no question that the defendants have already been tried for the same identical acts and conduct charged to be a crime in this case and to make them stand trial again for the same acts and conduct would be double jeopardy by subjecting these defendants "to embarrassment, expense and ordeal."

4. Defendants further show to the Court that there is a fatal variance in these warrants on the same principal (sic) as in the case of *State* v. *Cooke*, 246 NC 548, in that these warrants charge that one of the defendants is George Simpkins whereas the person sought to be charged is George Simkins, Jr. as shown by said former case of *State* v. *Cooke*, supra, and there being a George Simkins and a George Simkins, Jr., both living in the City of Greensboro and a warrant against George Simpkins could not be a warrant against George Simkins, Jr. and any attempt to amend said warrant to read George Simkins, Jr. would be a fatal variance under the decision of the North Carolina Supreme Court in *State* v. *Cooke*, supra.

For the reasons hereinabove enumerated, we respectfully ask this Court to quash the warrants and dismiss this action.

This 6th day of February 1958.

Annie Brown Kennedy, Harold L. Kennedy, William A. Marsh, Jr., C. O. Pearson, Attorneys for Defendants.

[fol. 33]

EXHIBIT A—INDICTMENTS

INDICTMENT—TRESPASSING

STATE OF NORTH CAROLINA
GUILFORD COUNTY

SUPERIOR COURT

Oct. 21, Criminal Term A. D. 1957

The Jurors for the State Upon Their Oath present, That George Simpkins late of the County of Guilford on the 7th day of December A. D. 1955, with force and arms, at and in the County aforesaid, unlawfully and wilfully enter and trespass upon the premises of Gillespie Park Golf Club, Incorporated, after having been forbidden to enter said premises, and not having a license to enter said premises, against the form of the statute in such case made and provided and against the peace and dignity of the State.

(s) HORACE R. KORNEGAY, Solicitor.

(Back of Indictment):

No. 4761

STATE

v.

GEORGE SIMPKINS

INDICTMENT—Trespassing

....., Pros.

Witnesses:
Ernest Edwards
Clyde Bass
John A. Lee
x W. J. Darby

Those witnesses marked x sworn by the undersigned Foreman and examined before the Grand Jury and this bill found—a True Bill.

(s) A. C. DOGGETT
Foreman Grand Jury.

[fol. 34]

INDICTMENT—TRESPASSING

STATE OF NORTH CAROLINA
GUILFORD COUNTY

SUPERIOR COURT

Oct. 21, Criminal Term A. D. 1957

The Jurors for the State Upon Their Oath present, That Phillip Cooke late of the County of Guilford on the 7th day of December A. D. 1955, with force and arms, at and in the County aforesaid, unlawfully and wilfully enter and trespass upon the premises of Gillespie Park Golf Club, Incorporated, after having been forbidden to enter said premises, and not having a license to enter said premises, against the form of the statute in such case made and provided and against the peace and dignity of the State.

(s) HORACE R. KORNEGAY, Solicitor.

(Back of Indictment):

No. 4759

STATE

v.

PHILLIP COOKE

INDICTMENT—Trespassing

....., Pros.

Witnesses
Ernest Edwards
Clyde Bass
John A. Lee
x W. J. Darby

Those witnesses marked x sworn by the undersigned Foreman and examined before the Grand Jury and this bill found—a True Bill.

(s) A. C. DOGGETT
Foreman Grand Jury.

[fol. 35]

INDICTMENT—TRESPASSING

STATE OF NORTH CAROLINA
GUILFORD COUNTY

SUPERIOR COURT

Oct. 21, Criminal Term A. D. 1957

The Jurors for the State Upon Their Oath present, That Joseph Studivent late of the County of Guilford on the 7th day of December A. D. 1955, with force and arms, at and in the County aforesaid, unlawfully and wilfully enter and trespass upon the premises of Gillespie Park Golf Club, Incorporated, after having been forbidden to enter said premises, and not having a license to enter said premises, against the form of the statute in such case made and provided and against the peace and dignity of the State.

(s) HORACE R. KORNEGAY, Solicitor.

(Back of Indictment):

No. 4762

STATE

v.

JOSEPH STUDIVENT

INDICTMENT—Trespassing

....., Pros.

Witnesses:
Ernest Edwards
Clyde Bass
John A. Lee
x W. J. Darby

Those witnesses marked x sworn by the undersigned Foreman and examined before the Grand Jury and this bill found—a True Bill.

(s) A. C. DOGGETT
Foreman Grand Jury.

[fol. 36]

INDICTMENT—TRESPASSING

STATE OF NORTH CAROLINA
GUILFORD COUNTY

SUPERIOR COURT

Oct. 21, Criminal Term A. D. 1957

The Jurors for the State Upon Their Oath present, That Samuel Murray late of the County of Guilford on the 7th day of December A. D. 1955, with force and arms, at and in the County aforesaid, unlawfully and wilfully enter and trespass upon the premises of Gillespie Park Golf Club, Incorporated, after having been forbidden to enter said premises, and not having a license to enter said premises, against the form of the statute in such case made and provided and against the peace and dignity of the State.

(s) HORACE R. KORNEGAY, Solicitor.

(Back of Indictment):

No. 4763

STATE

v.

SAMUEL MURRAY

INDICTMENT—Trespassing

....., Pros.

Witnesses:
Ernest Edwards
Clyde Bass
John A. Lee
x W. J. Darby

Those witnesses marked x sworn by the undersigned Foreman and examined before the Grand Jury and this bill found—a True Bill.

(s) A. C. DOGGETT
Foreman Grand Jury.

[fol. 37]

INDICTMENT—TRESPASSING

STATE OF NORTH CAROLINA
GUILFORD COUNTY

SUPERIOR COURT

Oct. 21, Criminal Term A. D. 1957

The Jurors for the State Upon Their Oath present, That Elijah H. Herring late of the County of Guilford on the 7th day of December A. D. 1955, with force and arms, at and in the County aforesaid, unlawfully and wilfully enter and trespass upon the premises of Gillespie Park Golf Club, Incorporated, after having been forbidden to enter said premises, and not having a license to enter said premises, against the form of the statute in such case made and provided and against the peace and dignity of the State.

(s) HORACE R. KORNEGAY, Solicitor.

(Back of Indictment):

No. 4764

STATE

v.

ELIJAH H. HERRING

INDICTMENT—Trespassing

....., Pros.

Witnesses:
Ernest Edwards
Clyde Bass
John A. Lee
x W. J. Darby

Those witnesses marked x sworn by the undersigned Foreman and examined before the Grand Jury and this bill found—a True Bill.

(s) A. C. DOGGETT
Foreman Grand Jury.

[fol. 38]

INDICTMENT—TRESPASSING

STATE OF NORTH CAROLINA
GUILFORD COUNTY

SUPERIOR COURT

Oct. 21, Criminal Term A. D. 1957

The Jurors for the State Upon Their Oath present, That Leon Wolfe late of the County of Guilford on the 7th day of December A. D. 1955, with force and arms, at and in the County aforesaid, unlawfully and wilfully enter and trespass upon the premises of Gillespie Park Golf Club, Inc. after having been forbidden to enter said premises, and not having a license to enter said premises, against the form of the statute in such case made and provided and against the peace and dignity of the State.

(s) HORACE R. KORNEGAY, Solicitor.

(Back of Indictment):

No. 4760

STATE

v.

LEON WOLFE

INDICTMENT—Trespassing

....., Pros.

Witnesses:
Ernest Edwards
Clyde Bass
John A. Lee
x W. J. Darby

Those witnesses marked x sworn by the undersigned Foreman and examined before the Grand Jury and this bill found—a True Bill.

(s) A. C. DOGGETT
Foreman Grand Jury.

[fol. 39]

EXHIBIT B—ORDER ALLOWING NOL PROS

IN THE SUPERIOR COURT, GREENSBORO DIVISION

DECEMBER 2ND, 1957 TERM

STATE OF NORTH CAROLINA

v.

GEORGE SIMPKINS, JOSEPH STUDIVENT, SAMUEL MURRAY, ELIJAH H. HERRING, LEON WOLFE and PHILLIP COOKE
(Trespassing)

The Solicitor for the State makes a motion for a Nol Pros with leave in the above cases. The motion is allowed as to each of the defendants.

WALTER E. JOHNSON, JR.
Judge Presiding.

NORTH CAROLINA—GUILFORD COUNTY

Certified A True Copy of Original on File in this Office. This December 13, 1957.

(s) EVELYN E. STORY, Deputy C. S. C.

IN SUPERIOR COURT OF GUILFORD COUNTY

The following witnesses, being duly sworn, testified as follows:

State's Evidence

CLYDE BASS testified:

Direct Examination (by Mr. Kornegay)

I live at 1502 Glenwood Avenue in the City of Greensboro; I am employed by the P. Lorillard Company, the makers of Old Gold cigarettes. On the 7th day of December 1955 I was employed at the Gillespie Park Golf Club, Inc. and that is on Troy Street, off Asheboro Street. I was assistant pro at that time and I took care of the Golf shop [fol. 40] and I took care of the whole thing when the pro was not there. I am referring to a professional golfer when I say pro, and his name is Mr. Edwards. My duties were at that time to look after the golf shop, the golf course and everything else when Mr. Edwards, the pro, was not there.

On December 7, 1955 I was at the Gillespie Park Golf Course. I arrived at work around 8 in the morning and Mr. Edwards came in shortly afterwards. He went out of town that morning. When Mr. Edwards left I was cleaning the golf shop and it is located about 50 yards from the first tee. When I say tee I mean that portion of the golf course off of which the ball is driven.

On the date of December 7, 1955 I saw the six defendants in this action. When I first saw them, they were coming up to the golf shop door. They were coming in the golf shop door. One or two other fellows were in the golf shop when these defendants came in. One of the defendants walked up to the counter and said, "We want to play golf." They had their golf bags with them at that time. I told them it was a private club for members and invited guest only. One of them walked up to the counter and dropped 75 cents on the counter and said, "We are going to play," and from there they walked out to the first tee and started playing. I think five of them dropped 75 cents on the counter. They formed a little line and came around as they dropped the 75 cents on the counter and they went out of the door. I don't recall exactly what time of day it was, but I imagine it was a little before noon. I did not accept the money. The money lay on the counter for a good thirty or forty-five minutes and then Mr. Edwards took the money. Mr. Edwards returned to the golf course sometime thereafter. I told them that they couldn't play, but they went ahead and played. They went directly to the first tee from the golf shop. When [fol. 41] they reached the first tee, they teed a ball up and started to play. They split up. There were five of them, I think, and they split up. It was not allowed that over four could play together and they split up in two threesomes. Mr. Edwards came in a few minutes after they teed off, and I informed him that we had players out there who were not invited to my knowledge. Then he got into his car and went over. They were about the second tee. The defendants did not present me any certificate, identification cards or letters. No one called me on their behalf to play. They did not have any authority to my knowledge to play. I had been working at that time for the golf club about 8 or 9 months. I did not give these defendants permission to play.

Cross Examination (By Mr. Kennedy)

When people come out to Gillespie Park Golf course to play it is not customary for them to present credentials in order to play. I know most of the members who present

themselves to play. Non-members are not allowed to play there. I did not ask any of these defendants whether they were members or not. I know just about all of the members. I did not make any effort to find out if these men were members or not. Usually if they are members, they'll let you know right quick. To my knowledge, no Negroes have ever played at the Gillespie Park Golf Course before this date. Some Negroes have presented themselves before this date to play, but none have played to my knowledge.

Exception No. 2

(Q. Why didn't they play? I had nothing to do with them not playing.

Mr. Kornegay: Objection.
The Court: Sustained.

Exception No. 2.

[fol. 42] Direct Examination (By Mr. Kornegay)

My name is Ernest Edwards. Right now I live in Orlando, Florida. I am the Golf Professional at the Open Air Country Club, which is in Orlando, Florida, and I have been in Orlando, Florida, since January 22nd. Prior to that time I lived in Greensboro and when I was living in Greensboro, I was pro manager at the Gillespie Park Golf Club, Inc. The golf professional promotes interest in the Golf Club by getting new players started, and I was employed as a professional golfer by Gillespie Park Golf Club, Inc. There was a golf course connected with the corporation and it is located west of Troy Street, north of 70 and 29 and north and east of Randolph Avenue Extension and south of Asheboro Street. It is in the City of Greensboro.

I was employed by the Gillespie Park Golf Club, Inc. since 1949, which was the approximate date of the organization of the corporation and I was so employed there on the 7th day of December, 1955. The officers of the corporation at that time were J. R. Hughes, President; C. F. Smith, Secretary, and D. H. Everett, Treasurer.

The size of the Golf Course is 18 holes.

My duties as professional for the Gillespie Park Golf Club, Inc. were to supervise, teach, to increase interest in

golf and as manager to take care of the money and turn it in to the Treasurer and to supervise play on the golf course. We had membership for the golf club, Inc., and the dues for membership was $50.00 a year plus $10.00 Federal tax, which totaled $60.00. It was my duty to collect those fees. We had some other type of memberships besides the annual fee of $60.00. Associate membership for a person who desired to play would have to pay additional greens fees as he played. All of the students would be eligible to play on the golf course plus their guest.

Exception #3:

Q. Now, state, sir, what relation, if any, there was be-
[fol. 43] tween the Gillespie Park Golf Club, Inc. and the Golf Course which you have described as located presently in Greensboro and bounded by Asheboro Street and Troy Street and Randolph Avenue.

Mrs. Kennedy: Objection.
Court: Overruled.

A. Gillespie Golf Club—Gillespie Park Golf Club was in possession of the Course on this date that you referred to.

Exception #3.

On December 7, 1955, it was in their sole possession. They hired me as pro-manager to operate the club for them. There was certain upkeep in connection with the golf course and it was kept up by a greens keeper and he was my brother at that time. My brother maintained the golf course and made improvements to make playing conditions better. He was employed the same length of time that I was employed. Our club house is situated near #10 tee and #9 green. In the pro shop we had a display room for merchandise and drinks and sandwiches for the convenience of the players, and we had a locker room which was provided for the members, and the members would pay a yearly fee for the lockers. We did not maintain lockers for any other persons other than the members.

I was in Burlington on the morning of December 7, 1955, and I went around 9:00 in the morning. I returned from Burlington about 11:30 or 12 o'clock. After I returned, I

went to the club house and I talked with Mr. Bass, the witness who just testified. After talking with Mr. Bass, I went out on the golf course and there was a twosome and a foursome playing and I asked them if they had permission to play and they said, no. Then I ordered them off the course. There were six people playing and those six people are the six defendants in this case. I asked them off the course two times. They ignored me and kept on playing. They were on #2 tee and #3 green when I ordered them off the course. The portion upon which they were playing [fol. 44] is maintained by the golf club. After they refused to leave, I called the police and Mr. Darby came to the golf course. He is a deputy sheriff of Guilford County and Mr. John Lee, another deputy sheriff, came along with him. When they arrived, the defendants were still on the golf course. I suggested to Mr. Darby that I would like for him to take these people off the golf course and he told me that he could not do it.

Mr. Darby went with me to the seventh tee, and in his presence I asked these defendants to leave. They ignored me and kept on playing. This was the second time that I ordered them off to play. They were on the seventh tee when I asked them in the presence of Mr. Darby to leave and that is a portion of the Gillespie Park Golf Course. It is kept up by the Gillespie Park Golf Club, Inc., and that is a part of the course that I supervise. I called for their names and the deputy sheriff helped me get their names, and they gave me their names and later we issued warrants. They completed nine holes of play and it must have been about an hour and a half or some two hours that they played. They played the first nine holes.

Cross Examination (By Mrs. Kennedy)

I was employed by the City of Greensboro before going to work for the Gillespie Park Golf Club, Inc., and I was pro-manager of the Greensboro Municipal Golf Course. It is the same course that is now or was at that time under the control of the Gillespie Park Golf Club, Inc. It is the same Golf Course. I was employed by the City around November 1, 1941, until I went to work for the Gillespie

Park Golf Club, Inc. I was paid by the City of Greensboro prior to going to work at the Gillespie Park Golf Club, Inc.

I am not familiar with the legal end of the Bylaws of the Gillespie Park Golf Club, Inc., but I believe I do know who is entitled to play on this Golf Course under the Bylaws of the Club. Members of Gillespie Park Golf Club, [fol. 45] members of the Carolina Golf Association, members of a club that belongs to the Carolina Golf Association and the students and guests of me as an instructor. The way I interpret the bylaws, members who are allowed to play other than the members of the corporation are members of the Carolina Golf Association, as a separate class. That is my interpretation of the bylaws. I last worked for the Gillespie Park Golf Club, Inc., July of 1957, and I haven't worked for them since that time. At the time the warrants were taken out in this case, I had an interest by way of a little merchandise which I left at the Golf Club. I was not on salary December 2, 1957, when these warrants were taken out. I don't recall what I asked each of these defendants on that particular date, but I do know that they did not show any credentials which would permit them to be on the course. I sometimes require persons to show credentials in order that they are permitted to play. I know most of the golfers there.

Exception #4:

Q. Did any Negroes play during the time you were employed by Gillespie Park Golf Course while you were there? Do you know of your own knowledge whether or not a Negro has played on the Gillespie Park Golf Course during the time you were employed by this association?

Mr. Kornegay: Objection as being immaterial.
Court: Sustained.

Exception #4.

Redirect Examination (By Mr. Kornegay)

After working for the City, I went to work for Gillespie Park Golf Club, Inc., and they were paying me December 7, 1955.

Redirect Examination (By Mrs. Kennedy)

After going to work for the Gillespie Park Golf Club, Inc., the City stopped paying me and I was paid by this corporation. The corporation hired me after they informed me that they were taking over.

[fol. 46] Exception #5:

Q. Did the persons talking with you concerning this new employment tell you under what authority they were taking over?

Mr. Kornegay: Objection.
Court: Sustained.

Exception #5.

I turned over these defendants' greens fees to Mr. Major Kuykendall. He was the Solicitor of the City Court.

W. J. Darby testified:

Direct Examination (By Mr. Kornegay)

I am Deputy Sheriff of Guilford County. I was a Deputy Sheriff for Guilford County on December 7, 1955. Sometimes around noon or shortly thereafter on that date, I went to the Gillespie Park Golf Course in response to a telephone call. Mr. Lee and I were on duty. I received a call at approximately one o'clock in the afternoon. When I arrived at the Golf Course, I saw Mr. Ernest Edwards, the professional there, and I talked with him. After talking with Mr. Edwards, I learned that he wanted me to arrest these defendants, but I advised him that he first would have to secure a warrant, and he informed me that he didn't have the names of these persons. Mr. Lee and I went with Mr. Edwards over and Mr. Edwards asked four of these defendants off of the golf course and I believe Elijah Herring was one of the persons asked off the Golf Course. The defendants began to argue and I advised them not to have any argument. All we wanted was their names and addresses and occupation. While Mr. Edwards was writing their names down, the other two defendants walked up. The

big fellow down on the end and one of the smaller ones. I believe the large fellow was Leon Wolfe. I don't think that Mr. Edwards told Leon Wolfe and the other fellow to get off of the course. I told him to go ahead and get their names [fol. 47] and addresses, and he did so, and we turned around and walked back to the club house. The six defendants kept on playing golf. When these defendants were ordered off of the golf course, it was at that time that they were on the golf course. I believe it was the golf course, for there was a lot of green grass around; there was a hole or little cup. I didn't notice that there was a hole or cup or anything around with a flag on it. Each of the defendants had golf sticks and they had some colored caddies with them. Then we went back to the club house and left them over on the green or tee or whatever it is over there.

Cross Examination (By Mr. Marsh)

Mr. Edwards took the names of the defendants. I don't remember whether or not they said to Mr. Edwards, when he took their names in my presence, that they were citizens of the City of Greensboro. They are Negro defendants.

Ernest Edwards (Recalled) testified:

Redirect Examination (By Mr. Kornegay)

Phillip Cooke, Elijah Herring, Samuel Murray, George Simkins, Joseph Studivent and Leon Wolfe are the same men I saw on the Gillespie Park Golf Course on the 7th day of December, 1955, and these are the same men that I ordered off of the Golf Course on that occasion.

Recross Examination (By Mr. Kennedy)

Each of these defendants gave me their address. I do not recall whether or not they all live in the City of Greensboro.

Redirect Examination (By Mr. Kornegay)

I don't think it entered in as to whether or not they were citizens and residents of Greensboro.

The State Rests.

Exception #6:

Defendants move for judgment as of nonsuit.
Judgment overruled. Exception. Exception #6.

[fol. 48]

IN SUPERIOR COURT OF GUILFORD COUNTY

Defendants' Evidence

GEORGE SIMKINS, JR. testified:

Direct Examination (By Mr. Kennedy)

I live at 215 North Dudley Street in the City of Greensboro. I have lived here about 33 years. I am a dentist. I have been practicing my profession in the City of Greensboro since 1949. I went on the Gillespie Park Golf Course on December 7, 1955. I decided to go on the Gillespie Park Golf Course that day because I belong to the Nocho Golf Club, Inc., and we had retained an attorney to look into the matter as to the status of the Gillespie Park Golf Course, to find out whether it was City owned or whether it was a private golf course.

Exception #7:

Q. Doctor, as a result of your communications with your attorney, did she make her findings known to you?

A. Yes.

Q. And as a result of those findings, did you have an opinion satisfactory to yourself that you should go to the Gillespie Park Golf Course?

Mr. Kornegay: Objection.
Court: Sustained. Exception #7.

Exception #8:

Q. As a result of your conversation or communication with your attorney, did you feel that you had a right to play golf at Gillespie Park Golf Course?

Mr. Kornegay: Objection.
Court: Sustained. Exception #8.

After communicating with the attorney that we retained, and after receiving the letter, first I went around to various members of the Council, trying to get them to allow Negroes to use the Gillespie Park Golf Course, and I talked with several members of the Council about it along with another group that went with me. Then after that some [fol. 49] time elapsed and a group of us, on Wednesday, December 7, 1955, a little after 12:00, decided we just wanted to play golf, and we went out there and attempted to play. Elijah Herring, Joseph Sturdivent, Leon Wolfe, Phillip Cooke and Samuel Murray went along with me, and these are the same defendants in this case and they at that time lived in Greensboro.

I am a member of another club that reciprocates with the Gillespie Park Golf Course, and I felt that I had a right to play out there. All of these defendants live in Greensboro. I did not stop playing when requested by the professional because I felt that it was a public course, and I had just as much right to be there as anybody else, and I am a taxpayer, and I knew it was a public course, and I had paid my money to play. When we were arrested, we came along peaceably.

Cross Examination (By Mr. Kornegay)

On this date, five other defendants and I went to Gillespie Park Golf Course and I decided about a week before December 7th to go. It was around the first of December. I would not say that I am the leader of the group that went with me. It was not my suggestion that we go. I don't know who suggested going and I didn't get together with anybody out there or anything. I had said previously that I would go out around that Wednesday and some of the fellows decided to go, too. I did not say that I got together with them or that I called them; I said that I got with some more people to go to the City Council. These men and I got together right in front of my office. We got together across the street from my office. It was not closer to my office than the home or businesses of any of these defendants. One of the defendants, Sam Murray, worked close to me, for he has a pool room right up the street. My father's office was located

in a building right at the corner of Pearson Street and Market Street. He has not practiced there in over 30 years. No sign is on the window. Sam Murray does run a pool [fol. 50] room up the street. The place where we met and the pool room, from my office, are about equal distance. I am not the leader of the group and it was not my motion and suggestion that all of us would go out and play golf on the Gillespie Park Golf Course.

I am a member of the Nocho Park and that is a golf course in the City of Greensboro. The City does own that course. I used to work for the City. Yes, we have a private corporation and that corporation was organized and set up as a golf club for Nocho Park Golf Course. I joined the corporation under the rules and regulations of the club, and that corporation is not a member of the Carolina Golf Association. There is a reciprocal agreement between players of the Nocho Park Corporation and the Gillespie Park Corporation. According to the bylaws, that agreement is in writing, that is, according to the bylaws of Gillespie Park. Yes, I know all about the bylaws. Their bylaws say that any member in good standing with another club. The bylaws very definitely state so.

Exception #9:

Q. Three of the men weigh over 200 pounds, don't they?

Mr. Marsh: Objection.
Court: Overruled.

A. Yes. Exception #9.

That's right, three of the men do weigh over 200 pounds. We have all played golf together. I had a lawyer look into the matter for me.

Exception #10:

Q. Who was that lawyer?

Mr. Kennedy: Objection.
Court: Overruled. Exception #10.

Mrs. Elrita Alexander. I got the letter June 24, 1954. Yes, I received the letter a year and a half before we went out to the golf course. Yes, in reliance upon the letter I received June, 1954, I went out on the golf course to play

[fol. 51] golf in December, 1955. Yes, I waited a year and a half. The letter is not addressed to me, it is addressed to the Nocho Park Golf Club, Inc. I have the letter with me now. You may see it. I was not further advised in this matter. I have never filed for membership in the Gillespie Park Golf Club, Inc. I was not invited by any members of the club to play on this occasion. I was not invited by either of the two golf professionals there.

Mr. Bass was on duty when we arrived at the Golf Shop or the club house. I did speak to Mr. Bass and some of the fellows spoke, too. Mr. Bass told me that we would not be allowed to play. He did not tell me that this was a private club and that I was not a member and I could not play. He told me that I would not be allowed to play and he would not take our money. Perhaps he did tell us it was a private club. In spite of that, I did go out to play after leaving my money on the counter. I was on the second hole or green when the professional, Ernest Edwards, came up. He ordered my group and I off of the course and we refused to go. We were at the seventh fairway when the two deputy sheriffs, along with Mr. Edwards, came up. Mr. Edwards asked me in the presence of these deputy sheriffs to leave, and Mr. Edwards told me that we were not members of the club and it was a private club. Notwithstanding their request to leave, we did not leave and we played the first nine holes of the golf course.

Redirect Examination (By Mr. Kennedy)

I relied on something other than just the letter in connection with playing on the course. I talked with several members of the Council about the course and I had talked with other people about playing out there. After my conversation with these people, I decided that I could play golf at the Gillespie Park Golf Course. After I was arrested I did something further to determine my right to play on the Gillespie Park Golf Course; I sued the City School Board and the Gillespie Park Golf Corporation.

[fol. 52] Exception #11:

Q. And got a declaratory injunction?

Mr. Kornegay: Objection.

Court: Sustained. Exception #11.

I brought this action after December 7th; I don't recall the exact date.

Exception #12:

Q. Were the other defendants seated here associated in that case?

Mr. Kornegay: Objection.
Court: Sustained. Exception #12.

Exception #13:

Q. As a result of your actions and the decisions in that case, do you feel that . . .

Mr. Kornegay: Objection.
Court: Let him finish his question.

Q. As a result of your actions and the result of the decisions in that case, do you feel that you still have a right to play at the Gillespie Park Golf Course?

Mr. Kornegay: Objection.
Court: Sustained. Exception #13.

Hazel Burch testified:

Direct Examination (By Mr. Marsh)

I am City Clerk of the City of Greensboro, and in the capacity as City Clerk I do hold certain legal instruments belonging to the City of Greensboro and they are in my possession and I have control of them. I have in my possession certain deeds relative to the land as designated.

Defendants' Exhibits 1, 2, 3, 4, and 5, introduced in evidence:

Exhibit #1—Lease

State of North Carolina
Guilford County

[fol. 53] This Lease

Made this the 19th day of April, 1949, by The Board of Trustees of the Greensboro City Administrative Unit, a corporation created by act of the 1949 General Assembly, hereinafter sometimes called the Board of Trustees, to Gillespie Park Golf Club, Inc., a North Carolina corporation, hereinafter sometimes called the Golf Club, Witnesseth That:

1. By a lease dated April 1, 1947, the property hereinafter described in this lease was leased by the Greater Greensboro School District and the Trustees of the City Administrative Unit to the City of Greensboro in order that the city might operate thereon a public golf course. The lease was for a term of one (1) year from the date thereof and thereafter from year to year, both the lessor and the lessee having the right to terminate the lease upon ninety (90) days written notice to the other of its intention so to do.

2. The title to the property is now vested in the Board of Trustees of the Greensboro City Administrative Unit, a body politic and corporate, pursuant to an act of the 1949 General Assembly entitled, "An Act Relating to the Schools of The Greensboro City Administrative Unit and to The Governing Body thereof."

3. The City of Greensboro has requested the Board of Trustees to execute this lease and has agreed that the lease dated April 1, 1947, hereinbefore referred to, shall be cancelled effective upon the execution of this lease.

4. The Board of Trustees is of the opinion that the property will not be needed for school purposes during the next five (5) years; and since a nine-hole golf course has been laid out thereon, the Board of Trustees is of the opinion that it is advisable to lease the property to the Golf Club in order that its use as a golf course may be continued

during the term of this lease, such use being, in the opinion [fol. 54] of the Board of Trustees, a public or semi-public use.

Now, therefore, The Board of Trustees hereby demises and lets, and the Golf Club hereby hires and rents, the premises in Gilmer Township, Guilford County, North Carolina, which are described as follows:

BEGINNING at a point in the southern margin of Asheboro Street, said point being South 34 deg. 35′ East 420 feet from the Southwest intersection of Lucerne Street and Asheboro Street; running thence South 58 deg. 22′ West 593.62 feet to a point; thence North 89 deg. 16′ 30″ West 208.50 feet to a point; thence South 8 deg. 50′ 30″ East 966.94 feet to a point; thence South 87 deg. 42′ 30″ East 409.15 feet to a point; thence South 5 deg. 23′ East 984.45 feet to a point; thence North 88 deg. 46′ East 163.55 feet to a point; thence South 84 deg. 50′ East 1178.38 feet to a point; thence North 6 deg. 0′ East 1201.02 feet to a point in the southern margin of Asheboro Street; thence along the southern margin of Asheboro Street North 52 deg. 38′ West 1777.90 feet to the point of beginning; save and except the following portions thereof:

(1) The tract of land occupied by the Gillespie Park School, including the school building or buildings, the school yard, the playground, and the athletic field.

(2) The tract of land occupied by the dwelling house at No. 1720 Asheboro Street, including the yard, the garden, and the driveway.

The Board of Trustees shall have the right at all times to designate the exact limits of the two exceptions set out above.

TO HAVE AND TO HOLD said premises, together with the privileges and appurtenances thereunto belonging, to the [fol. 55] Golf Club for the term and upon the conditions hereinafter set out.

FIRST. TERM; TERMINATION UPON NOTICE. The term of this lease shall be five (5) years from the date hereof; but the Golf Club may terminate this lease at any time upon sixty (60) days written notice to the Board of Trustees, and the Board of Trustees, if it needs the property for school purposes or if it desires to offer it for sale, may likewise terminate this lease upon sixty (60) days written notice to the Golf Club.

SECOND. RENT. The Golf Club agrees to pay to the Board of Trustees as rent for the leased premises the sum of One Thousand Dollars ($1,000.00) each year, such rent to be payable as follows: Two Hundred Fifty Dollars ($250.00) on the first day of January, April, July, and October of each year during the term of this lease.

THIRD. USE OF LEASED PREMISES. The Golf Club agrees that the leased premises shall be used only as a golf course, and that it shall be operated in such a way that it will not interfere with the proper operation of the Gillespie Park School or any of its activities. And the Golf Club agrees that no nuisance of any kind shall be permitted on the leased premises.

FOURTH. ENTRY UPON LEASED PREMISES FOR INSPECTION OR OTHER PURPOSES. The Golf Club agrees that it will permit the Board of Trustees, its officers, members, and agents to enter upon the leased premises, or any part thereof, at any reasonable time for the purpose of inspecting the premises or for any other purpose that the Board of Trustees may deem proper.

FIFTH. ASSIGNMENT; SUB-LEASE. Except with the prior written consent of the Board of Trustees, the Golf Club shall not assign this lease or any interest therein, nor shall [fol. 56] it sub-let any portion of the leased premises.

SIXTH. FORFEITURE OF LEASE. The Board of Trustees may, at its option, declare this lease forfeited and null and void upon the happening of any of the following:

(1) If the Golf Club fails to pay any quarterly installment of rent within ten (10) days after it becomes due and payable.

(2) If this lease is assigned, or if any portion of the leased premises is sub-leased, in violation of the terms of this lease.

(3) If the Golf Club breaches any of its other covenants herein contained, and continues to breach such covenant for a period of five (5) days after the Golf Club shall have been given notice of such breach by the Board of Trustees or by the City Superintendent of Schools.

If, in any such event, the Board of Trustees declares this lease forfeited and null and void, the Board of Trustees shall have the right to re-enter the leased premises and to dispossess the Golf Club and expel it therefrom, all without prejudice to the Board of Trustees' other rights and remedies as provided by law. Notice to quit possession, demand for the possession of the leased premises, and every other formality are expressly waived by the Golf Club in case of any such forfeiture of the lease.

SEVENTH. METHOD OF GIVING NOTICE. Whenever written notice by either party to the other is permitted hereunder, such notice may be given by first-class registered mail, and shall be deemed to have been received by the addressee twenty-four (24) hours after the mailing thereof if addressed to the Board of Trustees of the Greensboro City Administrative Unit, Greensboro, North Carolina; or to the Gillespie Park Golf Club, Inc., Greensboro, North Carolina; Provided, however, that either the Board of [fol. 57] Trustees or the Golf Club may by written notice to the other change the address to which such notice shall be sent by the other.

IN WITNESS WHEREOF, each of the parties hereto has caused this lease to be signed in its corporate name, attested, and sealed with its corporate seal, all done by its duly authorized officers in duplicate on the date hereof.

THE BOARD OF TRUSTEES OF THE GREENSBORO CITY ADMINISTRATIVE UNIT

By /s/ D. E. Hudgins, Chairman

ATTEST:

(SEAL)

/s/ B. L. Smith
Secretary

GILLESPIE PARK GOLF CLUB, INC.

By /s/ James R. Dorsett
President

ATTEST: (SEAL)

/s/ Calvin F. Smith
Secretary

STATE OF NORTH CAROLINA
GUILFORD COUNTY

I, DORIS S. HUMPHRIES, a notary public of Guilford County, North Carolina, certify that B. L. Smith personally came before me this day and acknowledged that he is secretary of the Board of Trustees of the Greensboro City Administrative Unit, a corporation, and that, by authority duly given and as the act of the corporation, sealed with its corporate seal, and attested by himself as its secretary. My commission expires January 21, 1951.

Witness my hand and official seal, this the 29th day of April, 1949.

/s/ Doris S. Humphries
Notary Public.

(SEAL)

STATE OF NORTH CAROLINA
GUILFORD COUNTY

I, DOROTHY PARKER, a notary public of Guilford County, North Carolina, certify that Calvin F. Smith personally came before me this day and acknowledged that he is secretary of Gillespie Park Golf Club, Inc., a corporation, and that, by authority duly given and as the act of the cor-
[fol. 58] poration, the foregoing instrument was signed in

its name by its president, sealed with its corporate seal, and attested by himself as its secretary.

My commission expires 3/9/50.

Witness my hand and official seal, this the 29 day of April, 1949.

/s/ Dorothy Parker
(SEAL) Notary Public.

STATE OF NORTH CAROLINA
GUILFORD COUNTY

The foregoing certificates of Doris S. Humphries and Dorothy Parker, notaries public of Guilford County, North Carolina, are adjudged to be correct. Let the instrument and the certificates be registered.

This the 20th day of May, 1949.

/s/ C. S. Lambeth
ASST. CLERK SUPERIOR COURT.

EXHIBIT #2—EXTENSION OF LEASE

STATE OF NORTH CAROLINA
GUILFORD COUNTY

THIS EXTENSION OF LEASE.

Made this the 20th day of April, 1955, by THE BOARD OF TRUSTEES OF THE GREENSBORO CITY ADMINISTRATIVE UNIT, a corporation created by act of the 1949 General Assembly, hereinafter sometimes called the Board of Trustees, to GILLESPIE PARK GOLF CLUB, INCORPORATED, a North Carolina corporation, hereinafter sometimes called the Golf Club,

WITNESSETH THAT:

1. By lease dated April 19, 1949, certain property therein described was leased by the Board of Trustees to the Golf Club for a term of five (5) years from the date thereof,

and by instrument dated April 20, 1954, the term of the lease was extended for one year from the date thereof, which extension has now expired.

[fol. 59] 2. The Board of Trustees is of the opinion that the property described in the lease will not be needed for school purposes during the next three years, and that it is advisable to lease the property to the Golf Club in order that its use for Golf Club purposes may be continued during such period of three years, such use being, in the opinion of the Board of Trustees, a public or semi-public use.

Now, therefore, the lease hereinbefore referred to is hereby extended for a term of three years from the date hereof upon the same terms and conditions and for the same rental as are set out in the lease.

In Witness Whereof, each of the parties hereto has caused this extension of lease to be signed in its corporate name, attested and sealed with its corporate seal, all done by its duly authorized officers in duplicate on or as the date hereof.

THE BOARD OF TRUSTEES OF THE GREENSBORO CITY ADMINISTRATIVE UNIT

By /s/ Jno. R. Foster
Chairman

ATTEST:

/s/ B. L. Smith
Secretary

(SEAL)

GILLESPIE PARK GOLF CLUB, INC.

By /s/ John R. Hughes
President

ATTEST:

/s/ Calvin F. Smith
Secretary

(SEAL)

Exhibit #3—Deed

By Mrs. Zella Allred (widow) to City of Greensboro:

Taken from Book No. 907, page 178.

This Deed Made this the 13th day of February, 1940, by Mrs. Zella Allred (widow of E. F. Allred), of Guilford County and State of North Carolina, party of the first part, to City of Greensboro, a municipal corporation located in Guilford County and State of North Carolina, party of the second part, Witnesseth, That the said party of the first [fol. 60] part, in consideration of ($120.00) One Hundred Twenty Dollars, to her paid by the said party of the second part, the receipt of which is hereby acknowledged, has bargained and sold, and by these presents does bargain, sell and convey unto the said party of the second part and its successors a tract or parcel of land in the County of Guilford and State of North Carolina, in Gilmer Township, adjoining the lands of Greater Greensboro School District and others, and bounded as follows:

> Beginning at an iron pipe, said pipe being referenced by co-ordinates 10,242.15 north, and 17,383.44 west, City of Greensboro datum, and being the southwest corner of the property as conveyed to the Board of Education of Greater Greensboro School District by Dr. E. E. Gillespie in Book 554, page 638, and running thence with said school property line north 88 deg. 46′ east 163.35 feet to an iron pipe in pile of stones; thence south 09 deg. 28′ west 140 feet to an iron pipe in ditch, said point being the southeast corner of Grantors property as conveyed to E. F. Allred by W. C. Bain, Book 200, page 618; thence up said ditch north 79 deg. 54′ west 131.62 feet to an iron pipe; thence north 05 deg. 29′ west 112.0 feet to the point of beginning, containing 0.43 acres.

For more complete description see attached Map No. D-161.

The above property was conveyed to E. F. Allred by W. C. Bain, et ux, Book 200, page 618.

This conveyance is made subject to taxes on the above described tract of land for the year 1940.

The above land was conveyed to Grantor by .....
See Book No. , page , etc.

[fol. 61] To Have and to Hold the aforesaid tract or parcel of land and all privileges and appurtenances thereunto belonging to the said party of the second part and its successor and assigns forever.

And the said party of the first part does covenant that she is seized of said premises in fee and has the right to convey the same in fee simple; that the same are free from encumbrances; and that ..... will warrant and defend the said title to the same against the claims of all persons whatsoever.

In Testimony Whereof, the said party of the first part has hereunto set her hand and seal the day and year first above written.

Mrs. Zella Allred (Seal)

Witness:

Approved as to form—
legal sufficiency.
H. C. Wilson, City Atty.

State of North Carolina—Guilford County.

I, Herbert B. Winston, Jr., a Notary Public of said County, do hereby certify that Mrs. Zella Allred (widow), grantor, personally appeared before me this day and acknowledged the execution of the foregoing deed. Let the said deed and this certificate be registered.

Witness my hand and seal this the 13th day of February, 1940.

Herbert B. Winston, Jr., N.P. (Seal)

My commission expires:

June 29, 1940.

STATE OF NORTH CAROLINA
GUILFORD COUNTY.

The foregoing certificate of Herbert B. Winston, Jr., [fol. 62] Notary Public of said County, is adjudged to be correct. Let the said deed and this certificate be registered.

Witness my hand and seal this February 15, 1940.

H. L. BUDGER, Deputy C.S.C.

Filed for registration on February 15, 1940, at 3:35 o'clock P.M., and duly recorded in the office of the Register of Deeds in Guilford County, N. C., in Book , page , etc.

J. H. McADOO, Register of Deeds.

EXHIBIT #4—DEED

by Laura W. Cone and Edward Toner Cone, Commissioners, to City of Greensboro:

Taken from Book 960, page 415.

THIS DEED, Made this the 30th day of June, 1941, by Laura W. Cone and Edward Toner Cone, Commissioners, of Guilford County and State of North Carolina, parties of the first part, to City of Greensboro of Guilford County and State of North Carolina, party of the second part, WITNESSETH, That the said parties of the first part, in consideration of ($10.00) Ten Dollars and other valuable considerations to them paid by the said party of the second part, the receipt of which is hereby acknowledged, has/have bargained and sold, and by these presents do bargain, sell and convey unto the said party of the second part and its successors a tract or parcel of land in the County of Guilford and State of North Carolina, in Gilmer Township, adjoining the lands of and others, and bounded as follows:

BEGINNING at an iron pipe in the east line of a tract of land as conveyed to City of Greensboro by C. C. Hudson, Tr., and recorded in Book 440, page 368, said point

being in grantors west line, and being N. 0 deg. 58′ E. 250.0 feet from an iron pipe in the northern margin of Abattoir Road and running thence along grantors [fol. 63] west line N. 0 deg. 58′ E. 1287.6 feet to an iron pipe corner with Greater Greensboro Schools Property; thence with line of Greater Greensboro Schools Property S. 84 deg. 50′ E. 1178.38 feet to an iron pipe at the end of Troy Street; thence a new line S. 34 deg. 55′ W. 1308.1 feet to an iron pipe at Northwest corner of old Chimney; thence S. 76 deg. 19′ W. 459.54 feet to the point of BEGINNING, containing 21.933 acres.

This conveyance is duly authorized by order entered on the 14th day of July, 1941, in a special proceeding entitled "Laura W. Cone, et al. v. Frances S. Hetherington, et al."

The above land was conveyed to grantor by Part of J. W. Cone Est. See Book No. , page , etc.

TO HAVE AND TO HOLD the aforesaid tract or parcel of land and all privileges and appurtenances thereunto belonging to the said party of the second part and its successors and assigns forever.

And the said parties of the first part do covenant that they are seized of said premises in fee and have the right to convey the same in fee simple; that the same are free from encumbrances; and that they will warrant and defend the said title to the same against the claims of all persons whatsoever.

IN TESTIMONY WHEREOF, the said part..... of the first part ..... hereunto set ..... hand..... and seal..... the day and year first above written.

/s/ Laura W. Cone COMMISSIONER (SEAL)

/s/ Edward Toner Cone COMMISSIONER (SEAL)

WITNESS:

STATE OF NORTH CAROLINA
GUILFORD COUNTY

I, Alice M. Bray, a Notary Public of said County, do hereby certify that Laura W. Cone & Edward Toner Cone, Com- [fol. 64] missioners, grantor, personally appeared before me this day and acknowledged the execution of the foregoing deed. Let the said deed and this certificate be registered.

Witness my hand and seal this the 30th day of June, 1941.

ALICE M. BRAY, N.P. (SEAL)

My commission expires: 2/15, 1942.

STATE OF NORTH CAROLINA
GUILFORD COUNTY

The foregoing certificate of Alice M. Bray, a Notary Public of said County, is adjudged to be correct. Let the said deed and this certificate be registered.

Witness my hand and seal this the 23 day of July, 1941.

CHARLES A. PRATT, Dep. C.S.C.

Filed for registration on July 23, 1941, at 10 o'clock A.M., and duly recorded in the office of the Register of Deeds in Guilford County, N. C., in Book , page , etc.

J. H. McADOO
Register of Deeds.

EXHIBIT #5 Taken from Book 1147, page 182.

DEED by Eugene G. Shaw, Comr., to City of Greensboro:

THIS DEED, Made this 6th day of December, 1946, by and between Eugene G. Shaw, of Guilford County, North Carolina, acting as Commissioner as hereinafter set forth, party of the first part; and the CITY OF GREENSBORO, municipal corporation, of Guilford County, North Carolina, party of the second part;

WITNESSETH: That Whereas, in the special proceeding now pending in the Superior Court of Guilford County, entitled "Eugene G. Shaw, Administrator of the Estate of Zella E. Allred, Deceased, vs. Russell E. Allred, et al.," the undersigned Eugene G. Shaw was duly appointed a Commissioner under an order entered by Honorable J. P. [fol. 65] Shore, Clerk of the Superior Court of said County, under date of July 13, 1945; and was duly authorized, empowered and directed to make a sale of the lands and premises described in the petition filed in said proceeding.

And Whereas, pursuant to said order the undersigned Eugene G. Shaw, Commissioner as aforesaid, after due advertisement in conformity with the provisions of the orders of the Court, conducted a sale and resale of said property, the last resale having been held on the 10th day of September, 1945, at the Courthouse door of Guilford County, in Greensboro, North Carolina, after due and legal advertisement as prescribed by the order of the Court and in accordance with the provisions of law, at which sale Oscar I. Wrenn became the last and highest bidder at and for the sum of $6,825.00, subject to 1945 taxes and also subject to confirmation by the Court.

And Whereas, more than 10 days have expired since the resale of said property during which time no increased or upset bid was filed, and no objection was interposed regarding said sale by anyone having any interest in the property; and thereupon the undersigned Commissioner, after sufficient investigation regarding the value of the property and adequacy of the bid, submitted a report recommending confirmation of said sale to the said Oscar I. Wrenn at and for the sum of $6,825.00, subject to 1945 taxes.

And Whereas, the said Oscar I. Wrenn has duly transferred and assigned his bid to the City of Greensboro, the party of the second part, and has requested that a deed be made to the party of the second part upon payment by it of the purchase price.

And Whereas, under date of September ...., 1945, an order was duly entered by Honorable J. P. Shore, Clerk of the

Superior Court of Guilford County, confirming said sale [fol. 66] and authorizing and directing said Commissioner to make and execute a good and sufficient deed conveying said lands in fee simple to the party of the second part upon payment of the purchase price; and whereas the purchase price has been paid in full.

Now, Therefore, in consideration of the premises and payment of the purchase price by the said party of the second part, receipt of which is hereby fully acknowledged, the party of the first part has bargained and sold and by these presents does hereby bargain, sell and convey unto the party of the second part, its successors and assigns, those certain tracts or parcels of land lying and being in Gilmer Township, Guilford County, North Carolina, and more particularly bounded and described as follows:

FIRST TRACT: BEGINNING at a stake in a pile of stones, the southeast corner of the Lewis tract of the W. C. Bain property and running thence South 7 deg. 35′ E 1040 ft. to stake in a ditch, same being Mile Run Branch; thence eastwardly down the said ditch about 540 feet to a stake in Benbow's line; thence North 2 deg. 12′ East with Benbow's line 140 feet to a pile of stones in Gillespie's line; thence South 81 deg. 30′ West with Gillespie's line 165 feet to a stake; thence with Gillespie's line North 4 deg. 5′ West 1005 feet to a stake in a pile of stones in Gillespie's line; thence North 86 deg. 15′ West with the Gillespie's line 410 feet to the point of BEGINNING, containing 10.3 acres more or less. Together with the right of way over a 40-foot road or street running from Randolph Avenue to the northwest corner of the tract of land above conveyed. The said 40 feet street or road to be cut 20 feet from the south side of the Lewis tract or the W. C. Bain property and 20 feet from the tract lying immediately south and adjoining the said Lewis tract.

SECOND TRACT: BEGINNING at a stone, Allred and Bain's corner; and running with Allred's line South [fol. 67] 7 deg. 35′ East 1040 feet to a stake on the bank of a ditch; thence up the ditch 80 feet to a stake;

thence crossing the ditch 10 feet; thence up the ditch 20 feet to a stake; thence crossing the ditch at right angles 10 feet to a stake; thence continuing up the creek 135 feet in all 235 feet to a stake; thence North 7 deg. 35′ West 965 feet to a stake in the center of a 20-foot street; thence with the center line of said street south 86 deg. 15′ East 218 feet to the BEGINNING, and containing 4.95 acres. One-tenth of an acre included in the above is in the street on the north end. Save and except therefrom a small tract comprising .43 acres conveyed by Zella E. Allred to the City of Greensboro by deed dated February 13, 1940, and recorded in Book 907, page 178, in the Office of the Register of Deeds of Guilford County, N. C.

This conveyance is made subject to City and County taxes for the year 1945.

TO HAVE AND TO HOLD said lands and premises unto it, said party of the second part, its successors and assigns forever in as full and ample manner as the party of the first part is authorized and empowered to convey the same.

IN TESTIMONY WHEREOF, the party of the first part has hereunto set his hand and affixed his seal on the day and year first above written.

EUGENE G. SHAW (SEAL).
Commissioner.

NORTH CAROLINA
GUILFORD COUNTY

I, J. P. Shore, C. S. C. of said County, do hereby certify that Eugene G. Shaw this day personally appeared before me and acknowledged his execution of the foregoing deed in his capacity as Commissioner for the purposes therein [fol. 68] expressed. Let the said deed, together with this certificate, be registered.

Witness my hand and notarial seal this 6 day of December, 1946.

J. P. SHORE
Clerk of Superior Court.

Filed for registration on December 6, 1946, at 11:50 o'clock A.M., and duly recorded in the office of Register of Deeds of Guilford County, N. C., in Book No. , page , etc.

J. H. McAdoo
Register of Deeds.

By: J. B. Carpenter,
Deputy Register of Deeds.

[fol. 69] MYRTLE D. COBB:

Direct examination.

By Mrs. Kennedy:

My name is Myrtle D. Cobb and I am Deputy Clerk in the Federal Court in Greensboro, and I have in my possession or it is my duty to keep in my possession public records concerning Federal cases and I do have in my possession the record in the case of Simkins, et al. v. The Gillespie Park Golf Course. I have all of the original papers in that case.

Exception #14.

Mr. Marsh: We have one further thing, may it please the Court. We issued a subpoena duces tecum to the President of the Gillespie Park Golf Club Association to bring over the bylaws of the corporation. I want to know if they have been brought.

Mr. Kornegay: They are here.

Mr. Marsh: May it please the Court, I should like to have marked as Defendants' Exhibit 8 the Bylaws of the Gillespie Park Golf Club, Inc., and specifically Section 2, which relates to the use of the golf facilities.

Mr. Kornegay: I am objecting to it unless they are identified or something.

Court: Mr. Hughes said he had them and handed them to him. Do you want him to call Mr. Hughes to the stand and say they are? I'll let him do that.

Mr. Kornegay: Of course, Mr. Hughes stood up, but so far there has been no identification of the minutes inso-

far as this court is concerned or the record. It was just a statement here.

Court: Sustained.

Mr. Marsh: We will call Mr. Hughes under G S 8-50 as an adverse witness.

Court: You can call him if you want to call him as a witness. I am not passing on G S 8-50 at this time. I don't want any misunderstanding about it; do you want to call him as your witness?

Mr. Marsh: I want to call him to identify this as being [fol. 70] the proper document.

Court: I am not asking you why you put him on the stand. I am asking you, do you want to call him as a witness?

Mr. Marsh: No, I don't want him as a witness.

Court: All right, have a seat then, Mr. Hughes. Any further evidence?

Mr. Marsh: Yes. We call Mr. Hughes.

Exception #14.

JOHN R. HUGHES:

Direct examination.

By Mr. Marsh:

I did come to court in response to subpoena duces tecum issued by the defendants in connection with the bylaws of the Gillespie Park Golf Club, Inc. I am the president of the corporation and I do have and identify these as the bylaws.

DEFENDANT'S EXHIBIT 8 admitted into evidence:

BY-LAWS OF THE GILLESPIE PARK GOLF CLUB, INC.

ARTICLE 1.

SECTION 1—Membership.

Membership in this corporation shall be restricted to members who are approved by the Board of Directors for

membership in this Club. There shall be two types of membership; one, the payment of a stipulated fee of $30.00 or more, plus tax, shall cover membership and greens fees. The other type of membership shall be $1.00, plus tax, but this type of member shall pay greens fees each time he uses the course. The greens fees and the amount of membership fees may be changed by the Board of Directors at any time upon two-thirds vote of the members of the Board.

SECTION 2—Use of Golf Facilities.

The golf course and its facilities shall be used only by [fol. 71] members, their invited guests, members in good standing of other golf clubs, members of the Carolina Golf Association, pupils of the Professional and his invited guests.

SECTION 3—Annual Meetings.

The annual meeting of the members of this corporation may be held in the office of the corporation in Greensboro, North Carolina, on the first Monday in April, 1950, and in each and every year thereafter. Said annual meetings shall transact such business as may properly be brought before it.

SECTION 4—Special Meetings.

Special meetings of the members may be called at any time by the President or three Directors.

SECTION 5—Quorum.

A quorum of the members shall consist of at least a majority who shall be present at the meeting in person or by proxy. A quorum at a Directors' meeting shall be a majority of the Directors being personally present.

SECTION 6—Voting Rights.

In all elections or re-elections of Directors of the corporation, a majority of the Directors present at a Directors' meeting voting affirmatively shall be sufficient to elect or re-elect Directors.

ARTICLE 2.

SECTION 1—Number and Term of Office.

There may be seven Directors of this corporation. Two of the incorporators, namely, Calvin F. Smith and E. J. Irving, shall be elected as Directors to serve for one year. Ross Weatherly, James R. Dorsett and Bob Whiteley are to be elected as Directors to serve for two years. John R. Hughes [fol. 72] and D. H. Everett are to be elected Directors to serve for three years. At the first organizational meeting, the above named shall be elected as Directors to serve for the periods specified. At each annual meeting of the Board of Directors, the Board of Directors shall elect or re-elect the Directors whose office expires. The election of Directors or the re-election of them and the election of the officers of the corporation shall be vested in the Board of Directors. The members of the corporation, if they so desire, may make suggestions to the Board with respect to members. The Board of Directors shall have power, upon resignation or death of any member of the Board of Directors, to fill the office by appointment until the next annual meeting of the Board of Directors.

. . .

. . . .ments made to the corporation and shall keep full and accurate accounts of all moneys received and paid by him on account of the corporation. The Treasurer shall do and perform any other act conferred upon him by the Board of Directors.

ARTICLE 4.

SECTION 1—Corporate Seal.

The Board of Directors shall provide a suitable corporate seal, showing the name of the corporation and the words "Gillespie Park Golf Club, Inc." Said seal, when obtained, shall be impressed on the margin of the minute book containing this Article of the By-Laws.

ARTICLE 5.

SECTION 1—Amendments.

[fol. 73] These By-Laws may be amended, altered or repealed by affirmative vote of a majority of the members of the corporation that are members of the Board of Directors. Authority for the amending, altering or repealing of the By-Laws shall be vested in the Board of Directors. Before the By-Laws may be amended, altered or repealed, notice shall be given to the Board of Directors of the nature or purpose of the amendment one week prior to a call meeting or a regular meeting. This notice may be waived in writing by the Directors. It shall be necessary for two-thirds of the members of the Board of Directors to vote affirmatively in order to amend, alter or repeal these By-Laws.

[fol. 74] Cross examination.

By Mr. Kornegay:

I am President of the Gillespie Park Golf Club, Inc., and I have been president of that corporation since the first president died.

Exception #15:

(Q: What was the purpose of that corporation?
A) The purpose of the corporation was to operate the golf club for the members of the club, their invited guests and members of the Carolina Golf Association.

Mr. Marsh: Objection. Documentary evidence is the best evidence.

Court: Overruled. The objection came after he had answered the question. Go ahead.
Exception #15.

When we took over the corporation the City did own the Golf Course, but we formed a corporation because there were men who were willing to back it and finance it. After

we leased the golf course from the City, we went into possession of the golf course. We put about $100,000 into the improvements. We raised this revenue from dues and several of our directors borrowed money from banks at different times to help finance and run the course. There was no tax money as a part of the $100,000. Not one nickel was given us by the City of Greensboro. The City had no voice in the operation of the golf course after the corporation took it up. We set up our own rules, we hired our own people. We paid the insurance for the various employees that we had. We operated completely on our own. The City had nothing whatever to do with it. The City did not pay any of the salaries of the employees. They paid no salaries to people who performed maintenance on the golf course.

When we first took over the golf course there was just the 9-hole golf course. The purpose of our taking it over was to expand it into an 18-hole golf course. At the time we took over the golf course the City had no plans for expansion. We added a club house which cost around $5,000. This money was not raised from tax money, but was financed [fol. 75] by the club. Members of other golf clubs were not entitled to play on our golf course without first filing an application with the club. Only our members had a right to play on the golf course. Those persons allowed to play were members of the Gillespie Park Golf Club, Inc., and their invited guests and members in good standing of other clubs that were members of the Carolina Golf Association. We instructed the professional Ernest Edwards in regard to who was entitled to play. For memberships we made an application to the Pro or some of the other directors and it was acted upon.

Exception #16:

Q. Are you familiar with the membership of the Carolina Golf Association?

A. I was of the date of the 5th of December, 1955.

Q. As of December 5, 1955, . . .

Mr. Marsh: I think that is irrelevant. The Carolina Golf Association is not at issue in this case.

Court: Go ahead.

Exception #16.

Exception #17:

Q. Was the Nocho Park Golf Club, Inc: a member of the Carolina Golf Association on that date?

Mr. Marsh: Objection.

Court: Overruled.

A. No, sir, it was not.

Exception #17.

There was no reciprocal agreement between the Gillespie Park Golf Club and Nocho Park Golf Club with reference to playing on the course. Our reciprocation was with other clubs that were members of the Carolina Golf Association.

Exception #18:

Q. Did any of these defendants on the 7th day of De-
[fol. 76] cember, 1955, or any date prior thereto file with the Gillespie Park Golf Association an application for membership?

Mr. Marsh: Objection.

Court: Overruled.

Exception #18.

A. No, sir, they did not to my knowledge.

Redirect examination.

By Mr. Marsh:

I did not testify for my association in the case of Simkins and others against the City of Greensboro, Board of Education and Gillespie Park Golf Club, Inc.

Exception #19:

Q. Mr. Hughes, I hold in my hand a document purporting to be a transcript of the testimony in the case.

Mr. Kornegay: Objection.

Court: Bear in mind that he is your witness.

Mr. Marsh: I called him under 8-50.

Court: I told you that you could call him as your witness. I'll be glad to read any statute that you have. The objection is sustained.

Exception #19.

Exception #20:

Q. You say, I believe, that you were President of the Gillespie Park Golf Club, Inc.?

A. I am.

Q. As such, you are interested in the continuation of that Association?

Mr. Kornegay: Objection.

Court: Sustained.

Mr. Marsh: If your Honor please, I want to show that he is a hostile witness.

Court: I have sustained the objection.

Exception #20.

Exception #21:

Q. Prior to your organization of the Gillespie Park Golf Club, Inc., were you not Director of and Chairman of the City Recreation of the City of Greensboro?

Mr. Kornegay: Objection.

Court: Sustained.

Exception #21.

(Witness excused.)

[fol. 77] Exception #22:

Mrs. Kennedy: If your Honor please, we'd like, if possible, to have a ruling on whether or not these would be admissible.

Court: I am going to sustain the objection as to those two Exhibits, that is #6 and #7.
Exception #22.

DR. GEORGE SIMKINS, JR.:

Redirect examination.

By Mr. Kennedy:

I, along with the other defendants, lived in Greensboro December 7, 1955. There was no sign saying no trespassing or members only, at the Gillespie Park Golf Course on December 7, 1955.

Exception #23:

Defendants and each of them move for judgment as of nonsuit.

Court: Motion overruled.
Exception #23.

In the Absence of the Jury, Mr. John R. Hughes Made the Following Statement to the Court:

Mr. Hughes: If your Honor please, I would like to ask the Reporter to read the question and answer which I gave in my testimony, so that we may get the record straight.

Question Read by Reporter as follows: "Mr. Hughes, did you testify for your Association in the case of Simkins and others against the City of Greensboro, Board of Education, and Gillespie Park Golf Club, Inc.?"

Mr. Hughes: In order that there may be no misunderstanding, I did testify in that case, but I was called as an adverse witness for the plaintiffs.

Court: Do you wish to call Mr. Hughes back to the stand?

Mr. Marsh: No, your Honor.

[fol. 78]

IN SUPERIOR COURT OF GUILFORD COUNTY

CHARGE OF THE COURT

Ladies and Gentlemen of the Jury: These are criminal actions in which the defendants, Phillip Cooke, Leon Wolfe, George Simkins, Jr., Joseph Sturdivant, Samuel Murray, and Elijah H. Herring, stand charged in separate warrants which are consolidated for trial with violation of the portion of the following statute which I will read to you:

"If any person, after being forbidden to do so, shall go or enter upon the lands of another without a license therefor, he shall be guilty of a misdemeanor and on conviction shall be fined not exceeding fifty dollars or imprisoned not more than thirty days."

To the charge against the defendants, and each one, each defendant has entered a plea of not guilty, and is thereupon presumed to be innocent. The presumption of innocence remains with the defendants and each of them throughout the progress of the trial until and unless the State has satisfied you from the evidence and beyond a reasonable doubt of such defendant's guilt. Of course, that rule applies equally to each defendant.

The State has offered evidence which it contends tends to show that on the date alleged in each warrant, that is December 7, 1958, Bob Bass was Assistant Pro and Ernest Edwards was the Professional and Manager of the Gillespie Park Golf Club, Inc., and that corporation operated a golf course and club house and locker room and pro shop on property located in the City of Greensboro.

The State has offered evidence which it further contends tends to show that on the date alleged, the professional and manager, Mr. Edwards, was away on business and that Bob Bass was in charge of the premises; that these defendants came to the club house or to the golf shop door and walked to the counter, and one of them said that they wanted [fol. 79] to play golf; that they were told that it was a private club for members and their guests and that one of them said, "We're going to play anyway"; that some, or perhaps all, as I recall the State's evidence tends to show,

that all of them dropped 75¢ on the counter and went out and played; that Bass did not accept the money; that he left it on the counter until Mr. Edwards came in and that Mr. Edwards thereafter turned it over, as I recall, to the Solicitor of Recorder's Court.

The State further contends that it has offered evidence which it contends tends to show that Mr. Bass told the defendants that they could not play but that they went to the first tee, split up in a foursome or twosome; that is, four defendants played together and the other two played together, and that when Mr. Edwards came onto the property that Mr. Bass told him what had happened.

The State has further offered evidence which it contends tends to show that Mr. Edwards went out and found, as I recall, some of the defendants on the second tee, second hole, and the others on the third, and that he told them that they should leave; that they were not permitted to play golf there; that he asked them if they had permission and they said, "No"; that he then ordered them off; that they kept on playing anyway; that he called the police and Mr. Darby and, as I recall, some other depufy sheriff came to the premises; that Mr. Darby went with him on the golf course and found the defendants at about the seventh hole; that he again ordered them off and they kept on playing; that he asked them for their names and they gave them their names and that the six persons were the six defendants in this case; that they continued to play and completed the nine holes of golf and then left.

The State has further offered evidence which it contends tends to show that the premises known as the Gillespie Park Golf Course have been operated since about 1949 [fol. 80] and have been in possession of the Gillespie Park Golf Club, Inc.; that that is a corporation which was formed and thereafter leased what was then known as the Gillespie Park from the City of Greensboro; that it was then a 9-hole course; that they added nine more holes to make an 18-hole golf course; that since going into possession under the lease, the corporation has maintained the property, improved it, added a building to the property, kept the golf course in repair and has accepted memberships and conducted the

golf course or golf club, a corporation, for the purpose of encouraging the playing of golf on the golf course.

The State further contends that the evidence favorable to it tends to show that the corporation was using the property for the purposes for which it was adapted or adaptable and that neither of the defendants is or was a member of the corporation or the golf club.

The State further contends that the evidence favorable to it tends to show that only those persons were permitted to play who were members or guests of the members or members of the Carolina Golf Association, either as individuals or from clubs that were members of that association or some other club that had a reciprocal playing agreement with the Gillespie Park Golf Club.

Now, the defendants, on the other hand, have offered evidence which they contend tends to show that the property which the golf course and club house and other facilities was located was the property of the City of Greensboro; that it had been owned by the City for many years prior to 1949 and was still owned by the City during 1955 and, particularly on December 7th of that year.

The defendants further contend that the evidence favorable to them tends to show that the City had leased the property to the corporation known as the Gillespie Park [fol. 81] Golf Club, Inc., and that the lease was a five-year lease and was thereafter extended, and that the lease was in existence or the extension of the lease was in existence on the date alleged in the warrant.

The defendants further contend that the evidence favorable to them tends to show that the defendant Dr. George Simkins, Jr. had approached some members of the Council and thereafter consulted an attorney, and in June, 1954, June or July, had received a letter from an attorney regarding the golf course; that he went there, he and the other defendants, to play golf; that each of them, so the defendants contend, is a citizen of the City of Greensboro and each was a citizen on the date of December 7, 1955.

They contend that the evidence favorable to them tends to show that Dr. Simkins and, as I recall it, the other defendants—you will rely on your own recollection about that—was a member of a golf club here in Greensboro known

as the Nocho Golf Club and that he considered that as a citizen of the City of Greensboro and also as a member of that golf club that he was entitled as a matter of right to go on the Gillespie Park Golf Club to play golf and the defendants contend that the evidence favorable to them tends to show that each of the defendants so considered that they had that right.

He further contends, or rather they contend, that the evidence favorable to them tends to show that the Nocho Club reciprocates with the Gillespie Club, so that a player from either club would have the right to play at the other and that he paid what he understood to be the charges normally assessed for a person to play who was not a member; that each of them paid the charges that he understood were normally assessed for a person to play who was not a member of that particular club.

The defendants further contend that the evidence favorable to them tends to show that while they were told by Mr. Bass and Mr. Edwards not to play or, as I recall, by [fol. 82] Mr. Edwards to leave after they were playing; that they did not do so because they considered it was their right to be there under the circumstances already suggested and indicated and that they knew it was City property; that they knew that each of them was a citizen of the City and a taxpayer; that they considered that under the by-laws of the Gillespie Park Club that they had a right to play there as well as under the law generally; that there was a reciprocal agreement between their Nocho Club and the Gillespie Park Club and they considered that they were within their rights and had no intention, so they contend, to violate any law but were simply asserting rights which they in good faith believed were there and which they contend, in fact, were there.

They contend, members of the jury, that the evidence favorable to them tends to show that they did not violate the statute under which they stand charged and that you should at least have a reasonable doubt as to their guilt and return a verdict of not guilty.

Now, members of the jury, I have not attempted to restate any of the evidence verbatim, but I have attempted only to briefly summarize the evidence. It is your duty,

however, to remember all of the evidence, and where your recollection of the evidence is in conflict with mine or counsel for the defendants or the Solicitor, you will be guided entirely by your own recollection. That is so because you are the sole triers of the fact. It is for you to say what the true facts are from the evidence as you recall and understand it to be. The law imposes upon the trial Judge the duty to state only so much of the evidence as is necessary to explain and apply the law arising thereon, and I instruct you that you will consider the law as I charge you the law to be with the facts as you find them to be and thereby arrive at your verdict.

[fol. 83] Now, the general rule of law as it relates to an alleged trespass under the statute which I read to you a few moments ago is to the effect that the trespass prohibited by the statute is not one against title but one against possession; that is to say, the statute falls in the category of criminal trespasses, those designed to protect possession whether the possession be actual or constructive. Our Supreme Court has said to constitute trespass under this statute after notice or warning under this statute three essential ingredients must co-exist: First, the land must be the land of the prosecutor in the sense that it is either in his actual or constructive possession.

Now, the State contends that the land was in the actual possession of the corporation. Actual possession is a tangible fact. Actual possession of land consists in exercising acts of dominion over it; and making the ordinary use of it to which it is adapted and in taking the profits of which it is susceptible.

Second, the accused must enter upon the land intentionally; and, third, the accused must do this after being forbidden to do so by the prosecutor.

Now, my recollection of the evidence of the State and the defendants is to the effect that the defendants walked into the club house or pro shop and were then told, first by Mr. Bass, that they would not be permitted to play. Now, it is not necessary for the State to show that they were forbidden to come upon the property before they ever came across the boundary line. It is sufficient, as to that third ingredient, that is that the accused must do this after

being forbidden to do so by the prosecutor—if the defendants came onto the property without being forbidden to do so, but after arriving, were told that they were not permitted to stay there and were not permitted to go upon the golf course or to play golf and notwithstanding that, remained, went upon the golf course and played golf, then [fol. 84] that would be conduct on the part of them after being forbidden to do so, and would be within the meaning of the third element which I just called to your attention; and provided, of course, that they were forbidden by the corporation or one of its duly authorized employees or agents.

Now, if the State has satisfied you from the evidence and beyond a reasonable doubt that the land in question, that is the golf course property, was the land of the corporation, that it had the actual possession of the property and that the defendants entered upon the land intentionally and that they did so after being forbidden to do so by an agent or employee of the corporation who was authorized to tell them that they could not play golf, then, nothing else appearing, that would constitute a violation of the statute. However, although the State may prove beyond a reasonable doubt in a prosecution under this statute that the accused intentionally entered upon the land in the actual possession of the corporation after being forbidden to do so by an agent of the corporation and thereby establish as an ultimate fact that the accused entered the property without legal right, the accused may still escape conviction by showing as an affirmative defense that he entered under a bona fide claim of right.

Bona fide claim of right means a claim of right in good faith or bona fide itself means in good faith. That is to say, when the defendants seek to excuse an entry without legal right as one taking place under a bona fide claim of right, then the burden is upon such defendant to show two things: not beyond a reasonable doubt or even by the greater weight of the evidence, but merely to the satisfaction of the jury, first, that he believed he had a right to enter; and, second, that he had reasonable grounds for such belief.

Now, the defendants by their plea of not guilty deny their guilt of each and every element of the offense charged,

[fol. 85] but they further say and contend that even if it be found that the land in question was in the actual possession of the corporation and that they entered the land intentionally and that they did so and remained there after being forbidden to do so, they say that even if that be found that they did so under a bona fide claim of right and that they believed they had a right to enter and that they had reasonable grounds for such belief.

Now, as to that question which arises upon the evidence, I instruct you then, ladies and gentlemen of the jury, that under the law as determined by the United States Court and as pronounced by them, the Gillespie Golf Club, Inc., by leasing the land from the City of Greensboro to use as a golf course was subjected to the same obligations as the City of Greensboro would have been had it operated a golf course itself. It was subjected to the same rights as the City would have had, the same obligations and same responsibilities; that is to say, the law would not permit the City and, therefore, would not permit its lessee, the Gillespie Park Golf Club, Inc., to discriminate against any citizen of Greensboro in the maintenance and operation and use of a golf course. It could not exclude either defendant because of his race or for any other reason applicable to them alone; that is to say, they were entitled to the same rights to use the golf course as any other citizen of Greensboro would be provided they complied with the reasonable rules and regulations for the operation and maintenance and use of the golf course. They would not be required to comply with any unreasonable rules and regulations for the operation and maintenance and use of the golf course.

Now, if the defendants—and I am speaking of them as the six defendants, but actually what I am saying applies to each as an individual; that is to say, one defendant may have a right because of evidence relating to him which [fol. 86] another one may not have because—in other words, what I am trying to say is this: that the case against each defendant will be considered individually. Each defendant will be either convicted or acquitted, depending upon the evidence as it relates to such defendant, and the guilt or innocence of one defendant or either defendant will not

depend in any way whatever upon your finding as to any other defendant.

Exception #24:

If the corporation organized and known as the Gillespie Park Golf Club, Inc., if it maintained property and operated and used it for a golf course belonging to the City of Greensboro and if the defendant was a resident of the City of Greensboro, then he had the same right to become a member of the golf club as any other resident of Greensboro, if he was a member of another golf club which had a reciprocal agreement with the Gillespie Park Golf Club to permit members on one course or members of one club playing on the other course, then such defendant and each of them had the same right or had the right to play upon that Gillespie Park Course. If the defendants, or either of them, were guests of some members of the Gillespie Park Golf Club, then they had a right to play upon that course.

In other words, ladies and gentlemen of the jury, they had the same right under the laws as interpreted by the United States Courts to play on the golf course as any other citizen of the City of Greensboro provided they complied with the reasonable rules and regulations designed for the orderly maintenance and use of the golf course by the citizens of Greensboro.

Now, the State contends in that respect that the defendants, and each of them, had never applied for membership in the golf club. It contends that there was no reciprocal agreement between the Gillespie course and the Nocho course. It contends that the defendants are not members of the Carolina Golf Association or any other group which [fol. 87] under its bylaws would permit the defendants to play thereon. It contends that the defendants have not offered any evidence to indicate what the usual charges would be for a person coming there to play and that while they did say that and have offered evidence to the effect that each of them paid 75¢ by dropping it on the counter, the State contends that there is no evidence that that was the usual or necessary or customary charge for people playing even as guests of the club.

The State contends that there was no rule or regulation designed to keep any citizen of Greensboro from playing who would comply with the rules and regulations; that the charges were as set out in the bylaws and were reasonable; that the only requirement for membership was to make an application and to be passed by the Board of Directors, and I instruct you if the defendants had made such application, that it would have been unlawful for the Board of Directors to have declined such application simply because of their race, and therefore would not have been permitted in law to do so.

The State contends, members of the jury, that these defendants, without making application for membership, without seeking an invitation from any member of the club, without being a member of any club with the reciprocal playing rights agreement with the Gillespie Club, simply of their own volition went upon this property and were immediately told that they had no right to be there; that they knew that they had no right to be there and that notwithstanding that, that they intentionally and purposely and deliberately proceeded to play on the golf course, and after being told again by the manager and professional, that they continued to disregard the instructions of the agent of the corporation in possession of the land; so the State contends that it was a willful, intentional and deliberate trespass without any right and without any semblance of right on the part of the defendant.

Exception #24.

[fol. 88] The defendants on the other hand contend to the contrary. They contend that while they were not members of the club, that as citizens of Greensboro they had a right to go there and play; that they were members of a golf club which had a reciprocal agreement with the Gillespie Park Golf Club; that they paid what is the normal charge for playing golf by one who is not a member of the club. They contend that they did no more than they had a right to do and that there is no criminal act in asserting one's right in a peaceable and lawful manner.

I instruct you, members of the jury, if a party entering upon the land has a legal right to do so, of course, he may not be convicted of a trespass. Guilt can arise only where

he has no such right and can arise then or rather cannot arise, then if the defendant in good faith believed he had a right to go upon the golf course and if there was reasonable grounds for such belief.

Now, in that respect, the defendants contend that they had a right, but if they did not, as a matter of fact, that they believed they did; that their belief was in good faith; that one of the defendants had consulted a lawyer and had a letter delivered to him by a lawyer about a year and a half before then; that he had talked to members of the City Council; that he believed that he had a right to go upon the golf course and play and that he simply thought that Mr. Edwards and Mr. Bass were mistaken when they told him otherwise, and he contends that—or rather, they contend that they had reasonable grounds for such belief; that the law does not permit any discrimination among citizens concerning public facilities and that they knew this was a public facility and they believed that the club that they belonged to had a reciprocal playing agreement with the Gillespie Park Club; that there is no evidence from anyone that anybody had ever told them they couldn't play on that course until after they got there and then it was only [fol. 89] assistant to the professional, a man that they were not acquainted with at that time, and so they contend that their conduct, if wrongful, was bona fide, in good faith and based upon reasonable grounds to believe that they had a right to do what they did.

They contend that they gave no one any trouble, used no force, freely and voluntarily gave their names to the officer when they were requested to do so, and that they in a peaceable manner merely exercised their rights as citizens, so they contend that you should not find that they wrongfully entered in the first place, but that if you do, that you should be satisfied that they did so under a bona fide claim of right; that they believed they had a right and that their grounds for believing that were reasonable.

Now, members of the jury, each time that I have made reference to certain showings which the State contends are sufficient to justify a conclusion against the defendants, I have not in each instance made reference to the burden of proof, but so that I will not be misunderstood, the bur-

den of proving the defendants' guilt is always upon the State and never shifts, that is, the burden of satisfying you from the evidence and beyond a reasonable doubt of the defendants' guilt. However, if the State has satisfied you from the evidence and beyond a reasonable doubt that the land in question was in the possession of the corporation; that the defendant entered it intentionally and after being forbidden to do so by duly authorized agent of the corporation, that would be an establishment of the ultimate fact that they entered the property without legal right, and if you so find, then—first, if you fail to so find, of course, you would return a verdict of not guilty, but even if you do so find, then you will consider whether the defendants have satisfied you not beyond a reasonable doubt, nor even by the greater weight of the evidence, but you will consider [fol. 90] whether they have merely satisfied you that they entered under a bona fide claim of right; that is, first, that they believed they had a right to enter and had reasonable grounds for such belief, and if upon a consideration of that they have satisfied you that they believed they had a right to enter and had reasonable grounds for such belief, then you would return a verdict of not guilty. On the other hand, if the State has satisfied you from the evidence and beyond a reasonable doubt that the defendant entered the land, that is the golf course property, that it was in the actual possession of the corporation; that they entered the land intentionally, purposely and deliberately and that they did so after being forbidden by an agent duly authorized by the corporation, if you so find from the evidence beyond a reasonable doubt and if the defendants thereupon have failed to satisfy you that they believed they had a right to enter and had a reasonable ground for such belief, then you would return a verdict of guilty.

Now, members of the jury, you may, depending upon how you find, return a verdict of guilty against any one or more of the defendants or against all the defendants, or you may return a verdict of not guilty for one or more of the defendants or for all defendants. As I said earlier, the verdict of one is not dependent upon the verdict in the case of any other.

"Furthermore, in passing upon the guilt or innocence of the defendants, I instruct you that you will consider the reasonableness or the unreasonableness of the testimony of each of the witnesses. You will give to the testimony of each such weight and credibility as you find it deserves. You may consider all inferences which may legitimately be warranted by the evidence to the end that you may arrive at the truth.

Furthermore, I instruct you that your verdict will not be prompted in any manner whatsoever by the race of the [fol. 91] defendants. That has absolutely nothing to do with the case in law and should not be considered by you. Under the law, all citizens have equal rights and equal responsibilities in the maintenance and use of public facilities, that is facilities maintained by the governmental unit in which they live, and therefore the fact that the defendants are Negroes certainly may not be considered to their prejudice nor to the prejudice of the State. In other words, ladies and gentlemen, you will consider the evidence as you recall and understand it to be with the law as I have attempted to instruct you the law to be, and arrive at a verdict which is fair, which is just and which speaks the truth.

Court: Is there anything else that the defendants or the State would like me to call to the attention of the jury?

Mrs. Kennedy: No.

Mr. Kornegay: No.

Court: You may retire, ladies and gentlemen, and make up your verdict.

IN SUPERIOR COURT OF GUILFORD COUNTY

MOTION TO SET ASIDE THE VERDICT

Now come the defendants and each of them, all being Negro citizens of the City of Greensboro, North Carolina, through counsel, and make the following motion: That the verdict rendered by the jury against the above-named movants, defendants in this case, be set aside, that the Court withhold and arrest judgment and discharge the defendants notwithstanding the verdict, or grant the defendants a new

trial, and as grounds for this motion defendants respectfully show to the Court the following:

I. Defendants incorporate in this motion by reference the Motion to Quash heretofore filed herein, and respectfully pray the Court to grant this motion for the reasons set forth in said Motion to Quash, except insofar as the grounds stated therein may have been waived by these defendants.

[fol. 92] II. That the Supremacy Clause (Article VI) of the Constitution of the United States requires this Court to give effect to and to enforce the judgments of the United States Courts covering the subject matter of this prosecution, particularly the "Decree and Injunction" of the United States District Court for the Middle District of North Carolina, in Civil Case No. 1058, in which these defendants were plaintiffs and Gillespie Park Golf Club, Inc., was one of the defendants, covering the identical acts and conduct charged by the State to be a crime of trespass in this case, said "Decree and Injunction" reading in part as follows:

"It is now ordered, adjudged and decreed that defendants have unlawfully denied the plaintiffs as residents of the City of Greensboro, North Carolina, the privileges of using the Gillespie Park Golf Course, and that this was done solely because of the race and color of the plaintiffs, and constitutes a denial of their constitutional rights, and unless restrained will continue to deny plaintiffs and others similarly situated."

That the State of North Carolina and its Jury in this case undertake to find to be criminal the identical acts and conduct which said "Decree and Injunction" holds to be protected by the Constitution of the United States, and further undertake to find to have been lawfully done, that which said "Decree and Injunction" holds was "unlawfully done," and that to permit said verdict to stand and to punish these defendants on the basis of said verdict would nullify and render ineffectual the rights of these defendants which said "decree and injunction" holds to be guaranteed and protected by the Constitution and laws of the United States, including the due process and equal protection clauses of the 14th Amendment.

III. That a written opinion was handed down in the said case in the United States District Court for the Middle [fol. 93] District of North Carolina by United States District Judge Johnson J. Hayes, which opinion is reported in 149 Fed. Supp. 562, and in which Judge Hayes said of the identical acts and conduct which the verdict finds to be criminal in this case, the following.

"This golf club permits white people to play without being members, or otherwise, except it requires the payment of greens fees. The plaintiffs here paid their fees, were forced off the course by being arrested for trespass. Everybody knows this was done because the plaintiffs were Negroes and for no other reason. This Court cannot ignore it."

Defendants respectfully request this Court to take judicial notice of this matter of common knowledge pertaining to this public golf course owned and operated by their agency by the City of Greensboro and the Greensboro City Board of Education. That this matter of common knowledge about the Gillespie Park Golf Course was spoken truly and not idly by Judge Hayes when he wrote that "everybody knows" it was shown by Jurors in this case in their answers to questions touching their qualifications. Those who had played on Gillespie Park Golf Course stated very frankly and freely in open court that they had played on this course without any requirements except the payment of greens fees. Defendants respectfully suggest that, if any confirmation of Judge Hayes' statement that this was common knowledge which "everybody knows" is necessary it is found in these statements of the Jurors in this case.

Defendants respectfully suggest to the Court that to permit this verdict to stand under these circumstances would violate the rights of these defendants under the Constitution and laws of the United States, including the due process and equal protection clauses of the 14th Amendment.

IV. That said "Decree and Injunction" of the United States District Court for the Middle District of North Carolina begins as follows:

"This cause coming on for hearing and the Court having heard the evidence and argument of counsel and carefully

considered the same and the briefs filed, and having made the findings of fact and conclusions of law which appear of record."

Defendants respectfully suggest to the Court that this reference in said "Decree and Injunction" to the findings of fact and conclusions of law which appear of record makes them a part of the "Decree and Injunction" just as if written out therein in full; and for this reason and also because said findings of fact and conclusions of law are a part of the record and judgment roll in said case in the United States District Court for the Middle District of North Carolina covering the identical acts and conduct which said verdict seeks to make a crime, the Supremacy Clause of the Constitution of the United States lays a duty upon this Court to respect and give effect to said findings of fact and conclusions of law, and especially to Finding of Fact 33, which reads as follows:

"White citizens of Greensboro are given the privilege of becoming permanent members by paying $60.00 per year without green fees and others not permanent members by paying $1.00 per year and green fees of $.75, except on holidays and weekends, when it is more. On days other than holidays and weekends when green fees are $1.25 white citizens are permitted to play without being members by paying the fees above set forth and without paying the extra $1.00 and without any questions being put to them. When the plaintiffs applied to be given the same privilege they were refused on the ground that they were not members but primarily because of their color. Plaintiffs laid the green fees on the table in the club house, went out to play and after they had gotten to the 3rd hole the 'pro' in charge of the golf course ordered them off and they insisted they had a right to play and would not get off unless they were [fol. 95] arrested by an officer, whereupon the 'pro' had them arrested and they were tried and convicted and sentenced to imprisonment for a period of 30 days, which is the maximum under the law for the State of North Carolina for trespassing."

Defendants further respectfully show to the Court that on these facts Judge Hayes said in his opinion the following:

"Citizenship in the United States imposes uniform burdens, such as paying taxes and bearing arms for the preservation and operation of our government. In like manner, whatever advantages or privileges one citizen in the United States may enjoy through his liberty becomes the constitutional right of each citizen and without regard to race, color or creed. These principles of law have been fully and elaborately established in the Fourth Circuit Court of Appeals and by the Supreme Court of the United States and must be adhered to in this case."

Defendants respectfully suggest to the Court that the verdict in this case not only does not adhere to these principles, but if permitted to stand would seek to thwart and nullify these principles; and that said verdict should be set aside to permit said principles to be adhered to and vindicated.

V. That the evidence in this case and the instructions of the Court to the Jury show that the land on which Gillespie Park Golf Course is situated is public and not private property, whereas G S 14-134, which is the North Carolina statute under which the warrants were drawn in this case, is meant to cover private property and not public property. Said statute reads:

"If any person after being forbidden to do so shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, . . . "

Defendants respectfully suggest to the Court that this [fol. 96] statute was never intended to apply to public lands or public property, but was and is intended to apply solely and only to private property, and that the lands and property and the possession alleged to have been invaded in this case was public lands and property and the possession of an agency of the City of Greensboro and the Greensboro City Board of Education, which held the title to said lands and property. In this connection defendants respectfully call the Court's attention to Finding of Fact #30 in said case in the United States District Court for the Middle District of North Carolina:

"That the leases in this case undertook to turn over to a corporation having no assets or income highly valuable income-producing property belonging to the City and the school board, the chief officer and promoter of said corporation being an official of the city, and the city having no prospect of getting anything from said leases except out of the income which the leased property was already bringing in, and with the City reserving the right to put into the property further investments from other sources than said income and that under these circumstances said corporation was in fact an agency of the City and the school board for the continued maintenance and operation of the golf course for the convenience of the citizens of Greensboro."

Defendants further suggest to the Court that as citizens and taxpayers of the City of Greensboro, these defendants along with all other such citizens and taxpayers did have a license to go upon said lands upon which said Golf Course was situated, and that there is no evidence whatsoever in this case that these defendants were "without a license" to go upon or to remain upon said lands, and that the absence of such a license is an indispensable ingredient of the trespass established by G S 14-134.

[fol. 97] VI. Defendants further respectfully urge the Court to set aside the verdict in this case because of error in the Court's instructions to the Jury. In this connection, defendants respectfully suggest that in its instructions to the Jury the Court treated the Bylaw regulations of Gillespie Park Golf Club, Inc., governing eligibility for playing and use of the Golf Course as, and gave the Jury the impression that said Bylaw regulations governed entry upon and remaining upon the lands on which the Golf Course is situated, whereas in truth and in fact said Bylaw regulations show on their face that they have to do only with play and use of the Golf Course, and they do not even pretend to forbid any citizen of Greensboro or elsewhere to enter upon or to remain upon the lands involved. If these Bylaw regulations should have the latter effect, they would forbid all other persons than those named to visit the Golf Course as spectators upon these public lands.

Defendants further suggest that it was error for the Court in its instructions to give the Jury the impression

that G S 14-134 was intended to make a misdemeanor of non-compliance with rules and regulations governing the use of public lands, which is all that the Bylaw rules and regulations for playing on Gillespie Park Golf Course purport to do.

Respectfully submitted, this the 10th day of February, 1958.

/s/ Annie Brown Kennedy, /s/ Harold L. Kennedy, /s/ C. O. Pearson, /s/ William A. Marsh, Attorneys for Defendants.

The above motion was Denied.
Exception by the defendants.

[fol. 98]

IN SUPERIOR COURT OF GUILFORD COUNTY

ASSIGNMENTS OF ERROR

Defendants assign for error the following:

Assignment of Error 1: The action of the Court, as set out in Exception #1 (R. p. 28), in overruling defendants' motion to Quash the Warrants before the defendants entered a plea.

Assignment of Error 2: The action of the Court, as set out in Exception #2 (R. p. 41), in sustaining the State's objection to testimony of Clyde Bass as follows:

Q. Why didn't they play?
A. I had nothing to do with them not playing.

Mr. Kornegay: Objection.
Court: Sustained.

Assignment of Error 3: The action of the Court, as set out in Exception #3 (R. pp. 42-43), in permitting Ernest Edwards to testify as follows:

Q. Now, state, sir, what relation, if any there was between the Gillespie Park Golf Club, Inc. and the Golf Course which you have described as located presently in Greensboro

and bounded by Asheboro Street and Troy Street and Randolph Avenue.

Mrs. Kennedy: Objection.
The Court: Overruled.

A. The Gillespie Park Golf Club, Inc. was in possession of the Golf Course on December 7, 1955.

Assignment of Error 4: The action of the Court, as set out in Exception #4 (R. p. 45), in sustaining the State's objection to the testimony of Ernest Edwards as follows:

Q. Did any Negroes play during the time you were employed by Gillespie Park Golf Course while you were there? Do you know of your own knowledge whether or not a Negro has played on the Gillespie Park Golf Course during the time you were employed by this association?

Mr. Kornegay: Objection as being immaterial.
Court: Sustained.

[fol. 99] Assignment of Error 5: The action of the Court, as set out in Exception #5 (R. p. 46), in sustaining the State's objection to testimony of Ernest Edwards as follows:

Q. Did the persons talking with you concerning this new employment tell you under what authority they were taking over?

Mr. Kornegay: Objection.
Court: Sustained.

Assignment of Error 6: The action of the Court, as set out in Exception #6 (R. p. 47), in overruling defendants' motion for a judgment as of nonsuit at the close of the State's evidence.

Assignment of Error 7: The action of the Court, as set out in Exception #7 (R. p. 48), in sustaining the State's objection to testimony of George Simkins, Jr., as follows:

Q. Doctor, as a result of your communications with your attorney, did she make her findings known to you?
A. Yes.

Q. And as a result of those findings, did you have an opinion satisfactory to yourself that you should go to the Gillespie Park Golf Course?

Mr. Kornegay: Objection,
Court: Sustained.

Assignment of Error 8: The action of the Court, as set out in Exception #8 (R. p. 48), in sustaining the State's objection to the testimony of George Simkins, Jr., as follows:

Q. As a result of your conversation or communication with your attorney did you feel that you had a right to play golf at Gillespie Park Golf Course?

Mr. Kornegay: Objection.
Court: Sustained.

Assignment of Error 9: The action of the Court, as set out in Exception #9 (R. p. 50), in permitting George Simkins, Jr., on cross-examination, to testify as follows:

Q. Three of the men weigh over 200 pounds, don't they?

[fol. 100] Mr. Marsh: Objection.
Court: Overruled.

A. That's right. Three of the men do weigh over 200 pounds.

Assignment of Error 10: The action of the Court, as set out in Exception #10 (R. p. 50), in allowing George Simkins, Jr., on cross-examination, to testify as follows:

Q. Who was that lawyer?

Mr. Kennedy: Objection.
Court: Overruled.

A. Mrs. Elrita Alexander.

Assignment of Error 11: The action of the Court, as set out in Exception #11 (R. p. 52), in sustaining the State's objection as follows:

Q. And got a declaratory injunction?

Mr. Kornegay: Objection.
Court: Sustained.

Assignment of Error 12: The action of the Court in sustaining the State's objection to the testimony of George Simkins, Jr., on redirect examination, as follows:

Q. Were the other defendants seated here associated in that case?

Mr. Kornegay: Objection.
Court: Sustained.

Assignment of Error 13: The action of the Court in sustaining the State's objection to the testimony of George Simkins, Jr., on redirect examination, as follows:

Q. As a result of your actions and the decisions in that case do you feel that . . .

Mr. Kornegay: Objection.
Court: Let him finish his question.

Q. As a result of your actions and the result of the decisions in that case, do you feel that you still have a right to play at Gillespie Park Golf Course?

Mr. Kornegay: Objection.
Court: Sustained.

[fol. 101] Assignment of Error 14: The action of the Court, as set out in Exception #14, in refusing to allow John R. Hughes to be called as witness under G S 8-50 (R. pp 70-71):

Mr. Marsh: We have one further thing, may it please the Court. We issued a subpoena duces tecum to the President of the Gillespie Park Golf Club Association to bring over the bylaws of the corporation. I want to know if they have been brought.

Mr. Kornegay: They are here.

Mr. Marsh: May it please the Court, I should like to have marked as defendants' Exhibit 8 the Bylaws of the Gillespie Park Golf Club, Inc., and specifically Section 2, which relates to the use of the golf facilities.

Mr. Kornegay: I am objecting to it unless they are identified or something.

Court: Mr. Hughes said he had them and handed them to him. Do you want him to call Mr. Hughes to the stand and say they are? I'll let him do that.

Mr. Kornegay: Of course, Mr. Hughes stood up, but so far there has been no identification of the minutes insofar as this court is concerned or the record. It was just a statement here.

Court: Sustained.

Mr. Marsh: We will call Mr. Hughes under G S 8-50 as an adverse witness.

Court: You can call him if you want to call him as a witness. I am not passing on G S 8-50 at this time. I don't want any misunderstanding about it; do you want to call him as your witness?

Mr. Marsh: I want to call him to identify this as being the proper document.

Court: I am not asking you why you put him on the stand. I am asking you, do you want to call him as a witness?

Mr. Marsh: No, I don't want him as a witness.

Court: All right, have a seat then, Mr. Hughes. Any further evidence?

Mr. Marsh: Yes. We call Mr. Hughes.

Exception #14.

[fol. 102] Assignment of Error 15: The action of the Court, as set out in Exception #15 (R. p. 74), in permitting John R. Hughes to testify as follows:

Q. What was the purpose of that corporation?

A. The purpose of the corporation was to operate the golf club for the members of the club, their invited guests and members of the Carolina Golf Association.

Mr. Marsh: Objection. Documentary evidence is the best evidence.

Court: Overruled. The objection came after he had answered the question. Go ahead.

Assignment of Error 16: The action of the Court, as set out in Exception #16 (R. p. 75), in permitting John R. Hughes to testify on cross-examination as follows:

Q. Are you familiar with the membership of the Carolina Golf Association?

A. I was of the date of the 5th of December, 1955.

Q. As of December 5, 1955?

Mr. Marsh: I think it is irrelevant. The Golf Association is not at issue in this case.

Court: Go ahead.

Assignment of Error 17: The action of the Court, as set out in Exception #17 (R. p. 75), in permitting John R. Hughes, on cross-examination, to testify as follows:

Q. Was the Nocho Park Golf Club, Inc. a member of the Carolina Golf Association on that date?

Mr. Marsh: Objection.

Court: Overruled.

A. No, sir, it was not.

Assignment of Error 18: The action of the Court, as set out in Exception #18 (R. pp. 75-76), in allowing John R. Hughes to testify as follows:

Q. Did any of these defendants on the 7th day of December, 1955, or any date prior thereto file with the Gillespie Park Golf Association an application for memberships?

[fol. 103] Mr. Marsh: Objection.

Court: Overruled.

A. No, sir, they did not to my knowledge.

Assignment of Error 19: The action of the Court, as set out in Exception #19 (R. p. 76), in refusing to allow John R. Hughes, on redirect examination to be cross-examined under G S 8-50:

Q. Mr. Hughes, I hold in my hand a document purporting to be a transcript of the testimony in the case.

Mr. Kornegay: Objection.

Court: Bear in mind that he is your witness.

Mr. Marsh: I called him under 8-50.

Court: I told you that you could call him as your witness. I'll be glad to read any statute you have. (After reading) The objection is sustained.

Assignment of Error 20: The action of the Court, as set out in Exception #20 (R. p. 76), in sustaining the State's objection to the testimony of John R. Hughes as follows:

Q. You say, I believe, that you were President of the Gillespie Park Golf Club, Inc.?

A. I am.

Q. As such, you are interested in the continuation of that association?

Mr. Kornegay: Objection.

Court: Sustained.

Mr. Marsh: If your Honor please, I want to show that he is a hostile witness.

Court: I have sustained the objection.

Assignment of Error 21: The action of the Court, as set out in Exception #21 (R. p. 76), in sustaining the State's objection to the testimony of John R. Hughes, as follows:

Q. Prior to your organization of the Gillespie Park Golf Club, Inc., were you not Director of and Chairman of City Recreation of the City of Greensboro?

Mr. Kornegay: Objection.

Court: Sustained.

[fol. 104] Assignment of Error 22: The action of the Court, as set out in Exception #22 (R. p. 77), in sustaining the State's objection to Defendants' Exhibits 6 and 7:

Mrs. Kennedy: If your Honor please, we'd like, if possible, to have a ruling on whether or not these would be admissible.

Court: I am going to sustain the objection as to those two Exhibits, that is #6 and #7.

Assignment of Error 23: The action of the Court, as set out in Exception #23 (R. p. 77), in refusing to grant defendants' motion for judgment as of nonsuit at the close of all the evidence.

Assignment of Error 24: The action of the Court, as set out in Exception #24 (R. pp. 86-87), in charging the jury as follows:

"If the corporation organized and known as the Gillespie Park Golf Club, Inc., if it maintained property and operated and used it for a golf course belonging to the City of Greensboro and if the defendant was a resident of the City of Greensboro, then he had the same right to become a member of the golf club as any other resident of Greensboro; if he was a member of another golf club which had a reciprocal agreement with the Gillespie Park Golf Club to permit members on one course or members of one club playing on the other course, then such defendant and each of them had the same right or had the right to play upon that Gillespie Park Course. If the defendants, or either of them, were guests of some members of the Gillespie Park Golf Club, then they had a right to play upon that course.

"In other words, ladies and gentlemen of the jury, they had the same right under the laws as interpreted by the United States Courts to play on that golf course as any other citizen of the City of Greensboro provided they complied with the reasonable rules and regulations designed for the orderly maintenance and use of the golf course [fol. 105] by the citizens of Greensboro.

"Now, the State contends in that respect that the defendants, and each of them, had never applied for membership in the golf club. It contends that there was no reciprocal agreement between the Gillespie course and the Nocho course. It contends that the defendants are not members of the Carolina Golf Association nor any other group which under its bylaws would permit the defendants to play thereon. It contends that the defendants have not offered any evidence to indicate what the usual charges would be for a person coming there to play and that while they did say that and have offered evidence to the effect that each of them paid 75¢ by dropping it on the counter, the State contends that there is no evidence that that was the usual or necessary or customary charge for people playing even as guest of the club.

"The State contends that there was no rule or regulation designed to keep any citizen of Greensboro from playing who would comply with the rules and regulations; that the charges were as set out in the bylaws and were reasonable; that the only requirements for membership was to make an

application and to be passed by the Board of Directors, and I instruct you if the defendants had made such application, that it would have been unlawful for the Board of Directors to have declined such application simply because of their race, and therefore would not have been permitted in law to do so.

"The State contends, members of the jury, that these defendants, without making application for membership, without seeking an invitation from any member of the club, without being a member of any club with the reciprocal playing rights agreement with the Gillespie Club, simply of their own volition went upon this property and were immediately told that they had no right to be there; that they knew that they had no right to be and that notwithstanding that, that they intentionally and purposely and [fol. 106] deliberately proceed to play on the golf course, and after being told again by the manager and professional, that they continued to disregard the instructions of the agent of the corporation in possession of the land; so the State contends that it was a willful, intentional and deliberate trespass without any right and without any semblance of right on the part of the defendant."

Assignment of Error 25: The action of the Court, as set out in Exception #25 (R. pp. 91-97), in overruling the defendants' motion to set aside the verdict as being contrary to the greater weight of the evidence.

The foregoing is tendered by the defendants as their case on appeal to the Supreme Court.

This 21st day of March, 1958.

Annie Brown Kennedy, Harold L. Kennedy, William A. Marsh, Jr., C. O. Pearson, Attorneys for Defendant Appellants.

Service of the foregoing case on appeal is hereby accepted and receipt of a copy thereof is hereby acknowledged.

This 21st day of March, 1958.

Horace R. Kornegay, Solicitor, 18th Judicial District.

In Superior Court of Guilford County

Stipulations

It Is Stipulated and Agreed by and between the Solicitor for the State of North Carolina, Horace R. Kornegay, and the attorneys for the defendants, Annie Brown Kennedy, Harold L. Kennedy, C. O. Pearson, and William A. Marsh, Jr., that the foregoing shall constitute the case on appeal to the Supreme Court in this cause.

[fol. 107] It is further stipulated that the service of this case on appeal and the counter-case on appeal were made in apt time.

This the 4th day of April, 1958.

Horace R. Kornegay, Solicitor.
Harold L. Kennedy, Annie Brown Kennedy, William A. Marsh, Jr., C. O. Pearson, Attorneys for Defendant Appellants.

(Transcript Certified by Clerk Superior Court)

[fol. 147]

IN THE SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1958

No. 582—Guilford

STATE

v.

PHILLIP COOKE

STATE

v.

LEON WOLFE

STATE

v.

GEORGE SIMKINS, JR.

STATE

v.

JOSEPH STURDIVENT

STATE

v.

SAMUEL MURRAY

STATE

v.

ELIJAH H. HERRING

OPINION—Filed June 4, 1958

Appeal by defendants from Fountain, S. J., February 3, 1958 Criminal Term of Guilford (Greensboro Division).

On 2 December 1957 a warrant issued from the Greensboro Municipal-County Court for Phillip Cooke, charging that on 7 December 1955 he "did unlawfully and willfully enter and trespass upon the premises of Gillespie Park Club, Inc., after having been forbidden to enter said premises."

Similar warrants were on the same day issued for each of the other defendants.

Defendants moved in the Municipal-County Court to quash the warfants. Their motions were overruled. They [fol. 148] then entered pleas of not guilty. The court, after hearing the evidence, found each defendant guilty and imposed sentence. Defendants appealed to the Superior Court.

Attorney General Seawell and Assistant Attorney General Moody for the State.

Annie Brown Kennedy, Harold L. Kennedy, William A. Marsh, Jr., and C. O. Pearson for defendant appellants.

Rodman, J. The cases were, without objection, consolidated for trial in the Superior Court.

Before pleading to the merits in the Superior Court, defendants renewed their motions to quash as originally made in the Municipal-County Court. The motions made in apt time were overruled by the court.

Before considering the merits of the cases, we must ascertain if defendants were properly called upon to answer the criminal charges leveled against them. The motions to quash assign three reasons why defendants should not be called upon to answer the allegation that they violated the criminal laws of the State of North Carolina.

S. v. Cooke, 246 NC 518, 98 SE 2d 885, is relied upon for two of the three reasons assigned. An examination of that case is necessary to assay the merits of the motions. The crime with which defendants stand charged is a misdemeanor punishable by fine of $50 or imprisonment for thirty days, G.S. 14-134. The Municipal-County Court has jurisdiction of the offense charged. In December 1955 these defendants were charged in warrants issuing from that court with trespassing on the property of *Gillespie Park Golf Course*. They were convicted and appealed to the Superior [fol. 149] Court. That court's jurisdiction of the cases then before it was derivative and not original. In the exer-

cise of its derivative jurisdiction, it was confined to an inquiry as to the truth of the charges contained in the warrants issuing from the Municipal-County Court. It could not, in the exercise of that jurisdiction, try defendants for a different crime. Nevertheless, the warrants were amended in the Superior Court to charge defendants with a trespass on the property of *Gillespie Park Golf Club, Inc.* Defendants were convicted of the crime charged in the amended warrants. Defendants appealed their conviction to this Court. We held that the amended warrant, by substituting another property owner, charged a different crime from the crime originally charged, and for that reason the Superior Court could not, in the exercise of its derivative jurisdiction, try defendants on the new criminal charge.

Since the conviction by a court without jurisdiction to hear and determine the guilt or innocence of defendants was a nullity and the sentence imposed void, defendants could thereafter be tried when properly charged in a court having jurisdiction. S. v. Hicks, 233 NC 511, 64 SE 2d 871, cert. den. 342 US 381, 96 L ed 629. It is manifest there is here no double jeopardy. Green v. United States, 355 US ——, 2 L ed 199, on which defendants rely, has no application to the facts here presented. Double jeopardy is a valid defense when established by the facts. N. C. Constitution, Art. I, sec. 17; S. v. Mansfield, 207 NC 233, 176 SE 761. Where not disclosed by allegations of the bill or warrant, it is not a ground to quash.

In closing the opinion in the previous appeal, the writer, author of the opinion, said: "Defendants may, of course, [fol. 150] now be tried under the original warrant since the court was without authority to allow the amendment changing the crime charged; or they may be tried on bills found in the Superior Court for the crime attempted to be charged by the amendment."

The last clause of that opinion is also relied on in the motion to quash. The statement, accurate as to most of the counties of the State, is inaccurate with respect to Guilford and the other counties enumerated in the proviso to G.S. 7-64. The Legislature, in the exercise of its discretion, has denied to the Superior Court sitting in the counties named in the proviso to G.S. 7-64 the right to exercise con-

current jurisdiction with inferior courts in the trial of misdemeanors. Because of the limitations so imposed on the jurisdiction of the Superior Court of Guilford County, it could not exercise original jurisdiction of the crime charged, namely, trespass after being forbidden, and if defendants were to be prosecuted for the trespass presently charged, the prosecution had to originate in a court inferior to the Superior Court. This is made clear in the concurring opinion of Justice Parker, who said: "It seems plain that a verdict of conviction or acquittal on the warrants in this case as drawn would not be a bar to the new warrants in the form to which they were changed by the amendments."

The third and final reason assigned for quashing the warrants is the refusal of the court to take judicial notice of a judgment in a suit by defendants against the City of Greensboro, the Greensboro City Board of Education, and Gillespie Park Golf Club, Inc. (Simkins v. City of Greensboro, 149 [fol. 151] F Supp. 562) which adjudged the plaintiffs in that suit had been denied the privilege of using the property involved in that litigation because of their color or race. A motion to quash is a proper method of testing the sufficiency of the warrant, information, or bill of indictment to charge a criminal offense. It is not a means of testing the guilt or innocence of the defendant with respect to a crime properly charged. "The court, in ruling on the motion, is not permitted to consider extraneous evidence. Therefore, when the defect must be established by evidence *aliunde* the record, the motion must be denied." S. v. Cochran, 230 NC 523, 53 SE 2d 665; Richardson v. State, 4 SW 2d 79; 27 Am Jur 695.

Since none of the reasons nor all combined sufficed to sustain the motion to quash, the court correctly overruled the motion and put defendants on trial for the offense with which they were charged.

To invade property in the possession of another is a crime under our laws. The severity of the punishment for such invasion is measured by the character of the entry. But the essential ingredient in the crime is possession by the person named in the warrant. If the possession is actual, the State need only establish that fact, but if the State fails to establish actual possession, it must establish

a right to possession which by operation of law implies possession. S. v. Clyburn, 247 NC 455; S. v. Cooke, *supra;* S. v. Baker, 231 NC 136, 56 SE 2d 424.

Defendants do not controvert the fact that the corporation named in the warrant had physical possession of the property nor do they deny that over the protest of the agent of the corporation they took possession. The conduct [fol. 152] depicted and not denied would suffice to convict defendants of a forcible trespass. G.S. 14-126. It could easily have resulted in a serious breach of the peace. The State did not, however, charge them with that offense. It charged only the less grave offense of entry after being forbidden. As a defense to that charge, it is sufficient for defendants to establish that they entered under a *bona fide* belief of a right to so enter, which belief had a reasonable foundation in fact. S. v. Paggart, 170 NC 737, 87 SE 31; S. v. Wells, 142 NC 590; S. v. Fisher, 109 NC 817, but the burden is on the defendant to establish facts sufficient to excuse his wrongful conduct. S. v. Durham, 121 NC 546; S. v. Wells, *supra.* There was nothing in the State's evidence showing or tending to show any right on the part of defendants to enter after having been forbidden to do so. Hence the court correctly refused to allow defendants' motion for nonsuit.

Defendants offered in evidence a lease dated 19 April 1949 from the Board of Trustees of the Greensboro City Administrative Unit to Gillespie Park Golf Club, Inc. This lease recited that the property therein described had in 1947 been leased to the City of Greensboro so that the city might operate a golf course thereon, that Greensboro had agreed to cancel its rights under the lease, that lessor was of the opinion that it would not need the property for school purposes during the next ensuing five years and "since a nine-hole golf course has been laid out thereon, the Board of Trustees is of the opinion that it is advisable to lease the property to the Golf Club in order that its use as a golf course may be continued during the term of this lease, such use being, in the opinion of the Board of Trustees, a public [fol. 153] or semipublic use." The lease was for a period of five years at a rental of $1000 per annum, but with a provision that lessor might cancel upon sixty days' notice

if the property was needed for school purposes or if lessor desired to sell. An extension agreement was put in evidence extending lessee's term. The asserted trespass occurred during the extended term.

There is evidence that lessee had, during its term, expended more than $100,000 in enlarging the course from a nine-hole course to an eighteen-hole course, constructing a club house, and making other improvements. Defendants offered in evidence bylaws adopted by lessee. The only two which may have any pertinency to this action are sections 1 and 2 of article 1. They provide: "SECTION 1—Membership. Membership in this corporation shall be restricted to members who are approved by the Board of Directors for membership in this Club. There shall be two types of membership; one, the payment of a stipulated fee of $30.00 or more, plus tax, shall cover membership and greens fees. The other type of membership shall be $1.00, plus tax, but this type of member shall pay greens fees each time he uses the course. The greens fees and the amount of membership fees may be changed by the Board of Directors at any time upon two-thirds vote of the members of the Board. SECTION 2—Use of Golf Facilities. The golf course and its facilities shall be used only by members, their invited guests, members in good standing of other golf clubs, members of the Carolina Golf Association, pupils of the Professional and his invited guests."

The City Administrative Unit, a governmental agency separate and distinct from the City of Greensboro, had no [fol. 154] authority to operate recreational facilities which were not in some way related to the operation of the public school system. The Legislature created both County and City Administrative Units "for purposes of school administration." G.S. 115-4. The Administrative Unit, having acquired more land than was presently needed for school purposes, had legislative authority to lease the surplus. G.S. 115-126(5), Cline v. Hickory, 207 NC 125, 176 SE 250 p. 38 Am Jur 169. In the exercise of its discretion it could in good faith lease for a public or a private purpose. Prior to its lease to Gillespie Park Club, it had leased the property to the City of Greensboro. The City had apparently used it for recreational purposes and had erected a golf course thereon. When that lease terminated, the school

authorities leased to a private corporation, but in their lease were careful to state that lessee was taking and would use it for public or semipublic purposes, namely, the operation of a golf course. Having expressly declared that the use which the lessee would make was a public or semipublic use, the law will presume the parties intended and contemplated that the property should be used without unlawful discrimination because of race, color, religion, or other illegal classification. "It is an elementary rule of construction that parties will be presumed to have used language effectuating a lawful purpose rather than one which is unlawful." Beasley v. R.R., 145 NC 272; Newberry v. City of Andalusia, 57 So 2d 629. Since the operator of the golf club was charged with making a public or semipublic use of the property, it could not deny the use of the property to citizens simply because they were Negroes. This Court gave definite recognition to the principle of equality of [fol. 155] treatment as between whites and Negroes nearly three quarters of a century ago. Puitt v. Commissioners, 94 NC 709.

Dawson v. Mayor and City Council of Baltimore City, 220 F 2d 386; Lawrence v. Hancock, 76 F Supp. 1004; Tate v. Department of Conservation and Development, 133 F Supp 53; Culver v. City of Warren, 83 NE 2d 82, cited and relied upon by appellants are but applications of an established legal principle to the factual situations found to exist in each of those cases. This case in no wise questions the soundness of the legal principles there enunciated.

Since the decision in Brown v. Board of Education, 347 US 483, 98 L ed 873, 74 S Ct 686, separation of the races in the use of public property cannot be required. Judge Fountain expressly charged the jury that defendants could not be discriminated against because of color. He charged: "Now as to that question which arises upon the evidence, I instruct you then, ladies and gentlemen of the jury, that under the law as determined by the United States Court and as pronounced by them, the Gillespie Golf Club, Inc., by leasing the land from the City of Greensboro to use as a golf course was subjected to the same obligations as the City of Greensboro would have been had it operated a golf course itself. It was subjected to the same rights as the

City would have had, the same obligations and same responsibilities; that is to say, the law would not permit the City and, *therefore, would not permit its lessee, the Gillespie Park Golf Club, Inc., to discriminate against any citizen of Greensboro in the maintenance and operation and use of a golf course. It could not exclude either defendant because of his race or for any other reason applicable to* [fol. 156] *them alone;* that is to say, they were entitled to the same rights to use the golf course as any other citizen of Greensboro would be provided they complied with the reasonable rules and regulations for the operation and maintenance and use of the golf course. They would not be required to comply with any unreasonable rules and regulations for the operation and maintenance and use of the golf course."

It will be observed that Judge Fountain, in his charge, treated the lease as though it were made by the City of Greensboro in the exercise of one of its corporate functions. In fact the lease was made by the school unit which had no duty or right to operate a golf course but which voluntarily provided for public use.

The court further charged: "If the corporation organized and known as the Gillespie Park Golf Club, Inc., if it maintained property and operated and used it for a golf course belonging to the City of Greensboro and if the defendant was a resident of the City of Greensboro, then he had the same right to become a member of the golf club as any other resident of Greensboro, if he was a member of another golf club which had a reciprocal agreement with the Gillespie Park Golf Club to permit members on one course or members of one club playing on the other course, then such defendant and each of them had the same right or had the right to play upon the Gillespie Park Course. If the defendants, or either of them, were guests of some members of the Gillespie Park Golf Club, then they had a right to play upon that course.

"In other words, ladies and gentlemen of the jury, they had the same right under the laws as interpreted by the United States Courts to play on the golf course as any [fol. 157] other citizen of the City of Greensboro provided they complied with the reasonable rules and regulations

designed for the orderly maintenance and use of the golf course by the citizens of Greensboro."

He further charged, after stating defendants' contentions with respect to their right to play: "I instruct you, members of the jury, if a party entering upon the land has a legal right to do so, of course he may not be convicted of a trespass."

Defendants moved to set aside the verdict of guilty. As the basis for their motion they rely on Simkins v. City of Greensboro, *supra*, decided by the United States District Court in March 1957. Although defendants had the record in that case identified, they did not offer it in evidence. It is not a part of the record presented to us. Our knowledge of the facts in that case is limited to what appears in the published opinion.

Examining the opinion, it appears that ten people, six of whom are defendants in this action, sought injunctive relief on the assertion that Negroes were discriminated against and were not permitted to play on what is probably the property involved in this case. We do not know what evidence plaintiffs produced in that action. It is, however, apparent from the opinion that much evidence was presented to Judge Hayes which was not before the Superior Court when defendants were tried. It would appear from the opinion that the entry involved in this case was one incident on which plaintiffs there relied to support their assertion of unlawful discrimination, but it is manifest from the opinion that that was not all of the evidence which Judge Hayes had. We are left in the dark as to other [fol. 158] incidents happening prior or subsequent to the conduct here complained of, which might tend to support the assertion of unlawful discrimination. On the facts presented to him, Judge Hayes issued an order enjoining racial discrimination in the use of the golf course. Presumably that order has and is being complied with. No assertion is here made to the contrary.

To support their motion, defendants say in their brief: "That to allow the verdict to stand would amount to a collateral attack on the Federal decision." The mere assertion that a court of this State has not given due recognition to a judgment rendered by one of our Federal courts merits serious consideration.

The State challenges the assertion that there has been an attack, collateral or otherwise, on the judgment rendered by the District Court. It maintains that the questions to be answered are these: (1) Should a court take judicial knowledge of facts found at another time by another court in another action; and if this question be answered in the affirmative, (2) is the State, in a criminal prosecution, concluded by facts found in a civil action to which it is not a party?

Since defendants for reasons best known to themselves elected not to offer in evidence the record in the Federal court case, it is apparent that the first question propounded must be answered. Unless we are to depart from previous adjudications by this Court and similar decisions by the Federal courts and the courts of sister States, the answer to that question must be no.

Speaking with respect to judicial notice, Chief Justice Marshall said: "The looseness which would be introduced into judicial proceedings would prove fatal to the great [fol. 159] principles of justice, if the judge might notice and act upon facts not brought regularly into the cause. Such a proceeding, in ordinary cases, would subvert the best established principles, and overturn those rules which have been settled by the wisdom of ages." U.S. v. Wilson, 7 Pet. 150, 8 L ed 640.

Mr. Justice Miller said: "While it is certainly true that the pendency of a suit in one court is not a defense, though it may sometimes be good in abatement, to another suit on the same cause of action in another court of concurrent jurisdiction, it may be considered as established that when a judgment is recovered against the defendant in one of those courts, if it is a full and complete judgment on the whole cause of action, it may be pleaded as a defense to the action in that court where it is pending and undecided. Neither court would be bound to take notice of the judgment in the other court judicially." Schuler v. Israel, 120 US 506, 30 L ed 707. To like effect see S. v. McMilliam, 243 NC 775, 92 SE 205; Reid v. Holden, 242 NC 408, 88 SE 2d 125; Hampton v. Pulp Co., 223 NC 535, 27 SE 2d 538; Daniel v. Bellamy, 91 NC 78; Bluthenthal v. Jones, 208 US 64, 52 L ed 390; Williams-Perry v. Reeder, 17 NW 2d 98; Naffah v. City Deposit Bank, 13 A 2d 63; Belyeu v. Bow-

man, 41 So 2d 290; James v. Unknown Trustees, Etc., 220 P 2d 831; Swak v. Department of Labor & Industries, 240 P 2d 560; Paridy v. Caterpillar Tractor Co., 48 F 2d 166; Morse v. Lewis, 54 F 2d 1027; Helms v. Holmes, 129 F 2d 263; Atlantic Fruit Co. v. Red Cross Line, 5 F 2d 218; Polzin v. National Co-op Refinery Ass'n., 266 P 2d 293; Divide Creek Irrig. Dist. v. Hollingsworth, 72 F 2d 859, 96 ALR 937, with annotations; White v. Central Dispensary & [fol. 160] Emergency Hospital, 99 F 2d 355, 119 ALR 1002; Robinson v. Baltimore & O. R. Co., 222 US 506, 56 L ed 288; 31 CJS 627; 20 Am Jur 102.

Because the judgment in the case of Simkins v. Greensboro was not in evidence, the court had no knowledge in a legal sense of any facts there determined, and could make no pronouncement of law with respect to facts which were not in evidence. Judge Hayes' published opinion was available. That opinion is a declaration of the law on the facts which Judge Hayes found.

Since the court was not required to take judicial notice of the judgment in the civil action, we are not called upon to determine the effect which should have been given if offered in evidence.

When the doctrine of collateral estoppel should be applied is not always easily solved. In Van Schuyver v. State, 8 P 2d 688, it was held that a judgment in a civil action between prosecuting witness and defendant which determined the ownership of domestic fowl could not be used by the defendant in a criminal action to estop the State from prosecuting him on a charge of larceny. Similar conclusions have been reached in other jurisdictions with respect to the ownership of property. State v. Hogard, 12 Minn 293; People v. Leland, 25 NYS 943; Hill v. State, 3 SW 764 (Tex.).

It is said in the annotation to Mitchell v. State, 103 Am St Rep 17: "When the previous judgment arose in a case in which the state or commonwealth was the prosecutor or plaintiff and the defendant in the case at bar was also the defendant, and the judgment was with reference to a subject which is material to the case at bar, the doctrine of res judicata applies. (citations) But where the judgment to which it is sought to apply the doctrine of res judicata

[fol. 161] was rendered in a civil proceeding to which the state was not a party, or in a criminal proceeding to which the defendant in the case at bar was not a party, the doctrine of res judicata does not apply.. (citations)"

The Supreme Court of the United States has recognized and applied the law as there announced to differing factual situations. Compare U. S. v. Baltimore & O. R. Co., 229 US 244, 57 L ed 1169, and Williams v. N. C., 325 US 226, 89 L ed 1577. Other illustrations may be found in: S. v. Dula, 204 NC 535, 168 SE 836; Warren v. Ins. Co., 215 NC 402, 2 SE 2d 17; Powers v. Davenport, 101 NC 286; S. v. Boland, 41 NW 2d 727; People v. McKenna, 255 P 2d 452; S. v. Morrow, 75 P 2d 737; S. v. Cornwell, 91 A 2d 456; S. v. Greenberg, 109 A 2d 669. Extensive annotations appear as a note to Green v. State, 87 ALR 1251; 30A Am Jur 518. Defendants were not, as a matter of right, entitled to have the verdict set aside.

The exceptions to the admission and exclusion of evidence have been examined. We have found none which indicates prejudicial error or appears to warrant discussion.

We find

No error.

[fol. 162]

IN THE SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1958

No. 582—Guilford County

STATE

v.

PHILLIP COOKE, LEON WOLFE, GEORGE SIMPKINS, JR., JOSEPH STURDIVENT, SAMUEL MURRAY and ELIJAH H. HERRING

JUDGMENT—June 4, 1958

This cause came on to be argued upon the transcript of the record from the Superior Court, Guilford County: Upon consideration whereof, this Court is of opinion that

there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable William B. Rodman, Justice, be certified to the said Superior Court, to the intent that the proceedings be had therein in said cause according to law as declared in said opinion. And it is considered and adjudged further, that the defendants and surety to the appeal bond, Southern Fidelity Mutual Insurance Company, do pay the costs of the appeal in this Court incurred, to wit, the sum of One hundred and 20/100 dollars ($100.20), and execution issue therefor.

[fol. 169] [File endorsement omitted]

IN THE SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1958

No. 582

Eighteenth District

STATE

v.

PHILLIP COOKE, et al.

MOTION AND AFFIDAVIT SUGGESTING DIMINUTION OF THE RECORD—Filed April 29, 1958

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of North Carolina:

Now comes appellants, Phillip Cooke, Leon Wolfe, George Simkins, Jr., Joseph Sturdivent, Samuel Murray, Elijah H. Herring in the above-entitled cause and through their attorneys Annie Brown Kennedy and Harold L. Kennedy, make the following motion suggesting a diminution of the record herein and say:

1. That this is a criminal trial on warrants charging each of the defendants with entering and trespassing upon the land of another without license, after having been forbidden to do so. The cases were consolidated for trial. The defendants were convicted in the Municipal-County Court of Greensboro from which they appealed to the Guilford County Superior Court, where they were likewise convicted, from which they appealed to the North Carolina Supreme Court which appeal is now pending.

2. The Attorney General, before presenting the State's argument in these cases on April 29, 1958, first made a motion to dismiss the action based on the fact that the record does not disclose that the appeals from the Municipal County Court were properly perfected. This Motion was the first notice given defendants concerning this point inasmuch as said point was not discussed in the State's brief.

3. The record does not disclose what action was taken by either court in defendants' Motion To Quash.

4. That it is necessary for a proper determination of this appeal that the following portions of the proceedings had in the Courts below be brought before this Court, to wit:

The Records of the Municipal County Court of December 16, 1957 which show that upon conviction of the defendants, [fol. 170] each of them in open court gave notice of appeal at which time the Court recognized the defendants for the next term of Superior Court and continued each of them on their bond.

The records of the Municipal County Court of Greensboro of December 16, 1957, which show that defendants made a Motion to Quash before pleas were entered, said motion having been in writing and having been filed with the Clerk of Municipal Court, which motion was denied. Said motion was based upon the same rights and matters as the motion made in Superior Court and as printed on pages 28-32 of the record in this Court. That said motion was not filed as a part of the record of this Court, but its

existence is determinative of certain issues now pending before this Court.

The records of the Guilford County Superior Court of February 6, 1958, which show that the defendants made a Motion to Quash before pleas were entered and said motion was denied. The Motion made in Superior Court is the same motion that appears on pages 28-32 of the printed record of this Court. That this verified document be read and accepted both as a Motion and Supporting Affidavit.

Wherefore, appellants respectfully pray that this verified document be read and accepted both as a Motion and Supporting Affidavit and suggest a diminution of the record to the extent hereinbefore set out and that this Court shall direct the Municipal County Court of Greensboro, N. C. and the Superior Court of Guilford County, N. C. to certify and transmit to this Court the aforementioned records to be made part of the record upon this appeal.

This the 29th day of April, 1958.

/s/ Annie Brown Kennedy, /s/ Harold L. Kennedy,
Attorneys for Appellants.

[fol. 171] Verification

North Carolina
Wake County

Harold L. Kennedy, being first duly sworn, deposes and says: that he is one of the attorneys for the defendants in the foregoing annexed Motion and Affidavit Suggesting Diminution of the Record; that he has read and knows the contents thereof; that the things stated therein are true of his own knowledge, except those things alleged and stated upon information and belief, and as to those things he believes it to be true;

That he signs this verification as attorney for defendants because as attorney for defendants, he has more personal and intimate knowledge of the matter herein alleged, said matter being matter chiefly of law and of legal inferences.

/s/ Harold L. Kennedy, Affiant.

Subscribed and sworn to before me this 29th day of April, 1958.

/s/ Agnes K. Parker, Notary Public. My commission expires: 9-11-59.

(Seal)

A True Copy: /s/ Adrian J. Newton, Clerk of Supreme Court of North Carolina.

[fol. 172] [File endorsement omitted]

IN THE SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1958

No. 582

Eighteenth District

STATE

v.

PHILLIP COOKE, et al.

ANSWER TO MOTION SUGGESTING DIMINUTION OF THE RECORD—Filed April 30, 1958

The Attorney General, answering the Motion of the defendants Suggesting Diminution of the Record, for his Answer says:

(1) It is admitted that this is a criminal trial charging the defendants with criminal trespass for entering on the lands of another without license and after being forbidden, and that the defendants were convicted in the Municipal-County Court of Greensboro; that as shown from the record and case on appeal filed by the defendants in the office of the Clerk of the Supreme Court, the defendants did not properly effect their appeal from the Municipal-County Court of Greensboro to the Superior Court of Guilford County; that except as herein admitted the allegations of Paragraph 1 of the Motion are denied.

(2) It is admitted that the Attorney General made a Motion to Dismiss the action for that the record does not

disclose properly effected appeals from the Municipal-County Court to the Superior Court of Guilford County. It is further admitted that this Motion was made in open court with the statement on the part of the Attorney General that the Motion would be reduced to writing and that this point was not discussed in the State's Brief.

(3) It is admitted that the record does not disclose what action was taken in either Court upon defendants' Motion to Quash; the Attorney General alleges, however, that a Motion Suggesting Diminution of the Record cannot now be maintained an account of actions or transactions which may or may not have taken place in the Municipal-County Court.

(4) Answering the allegations of Paragraph 4, the Attorney General alleges that the case on appeal was settled and the defendants caused such parts of the record to be certified to this Court as they desired, and they cannot [fol. 173] now bring in additional portions of the record and especially the defendants cannot now bring in portions of the record from the Municipal-County Court since the defendants do not even allege that these parts of the record desired were ever certified to the Superior Court of Guilford County; that while the defendants allege that their Motion to Quash in the Municipal-County Court was made before pleas were entered and said Motion was in writing and filed with the Clerk of said Court they do not allege that it was ever certified to the Superior Court of Guilford County, and the Attorney General further alleges that the line of authority of this Court goes to the Superior Court of Guilford County and not to actions and transactions in the Municipal-County Court; it is further alleged by the Attorney-General that even if a Motion to Quash was made by the defendants and was denied by the Superior Court the same is not proper for that it appears from an inspection of the Motion that it deals with matters and things outside of the record which require for support extraneous evidence or matters that are required to be established by evidence aliunde the record, and, therefore, under the rulings of this Court when this type of defect is alleged the Motion must be denied (*State* v. *Cochran*, 230 N. C. 523; *State* v. *Brewer*, 180 N. C. 716).

Motion

The Attorney General moves to dismiss this appeal for that the jurisdiction of the Superior Court of Guilford County is derivative and the record certified to the Superior Court of Guilford County from the Municipal-County Court does not show that there was any proper notice of appeal from the Judgment of the Municipal-County Court in these actions, and no proper notice of appeal appearing in the record the cases of these defendants were never properly before the Superior Court of Guilford County.

Wherefore, having fully answered, the Attorney General prays the Court that the defendants' Motion Suggesting [fol. 174] Diminution of the Record be dismissed and that the Attorney General's Motion to Dismiss these appeals be allowed.

/s/ Malcolm B. Seawell, Attorney General of North Carolina; /s/ Ralph Moody, Assistant Attorney General.

North Carolina
Wake County

Ralph Moody, being duly sworn, says that he is Assistant Attorney General of North Carolina and verifies this Motion and Answer in behalf of the State; that he has read the foregoing Motion and Answer, and the same is true to his own knowledge except as to matters and things therein stated upon information and belief, and as to those matters and things he believes it to be true.

/s/ Ralph Moody, Assistant Attorney General.

Subscribed and sworn to before me on this the 30th day of April, 1958.

/s/ Adrian J. Newton, Clerk of the Supreme Court of North Carolina.

(Seal)

A True Copy: /s/ Adrian J. Newton, Clerk of Supreme Court of North Carolina.

[fol. 175] [File endorsement omitted]

IN THE SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1958

No. 582

Eighteenth District

STATE

v.

PHILLIP COOKE, et al.

REPLY TO MOTION TO DISMISS—Filed May 7, 1958

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of North Carolina:

Replying to the Motion of the Attorney General to dismiss the appeal in this case, the appellants respectfully show to this Honorable Court as follows:

1. The presence or absence of jurisdiction cannot be made the subject of stipulation, *Mason* v. *Commissioners of Moore*, 229 N.C. 626, 628, and therefore the stipulation of the Solicitor and the appellants concerning the record is not material on this point.

2. Trials on appeal from the Greensboro Municipal-County Court are entirely de novo, and upon the original papers which it is the duty of the Clerk of said Court to send to the Superior Court only when due notice of appeal has been given. It cannot be questioned that the Clerk sent up the papers on appeal, or that the appeal was received in the Superior Court, or that it was docketed and tried at the next term of Superior Court. (Record pages 2-22)

It should be presumed that the Clerk of the Municipal-County Court did his duty and that he would not have sent the original papers to the Superior Court for trial de novo unless due notice of appeal had been given. But, even if this Honorable Court should be unwilling to indulge in

that presumption, appellants respectfully suggest that the question of notice of appeal should be inquired into at least to the extent which was done in the case of *Mason* v. *Commissioners of Moore*, 229 N.C. 626, 627, where Mr. Justice Barnhill said for the Court:

"To guard against the possibility there may have been an error in transcribing the record, the Clerk of this Court communicated with the Clerk of the Superior Court of Moore County for the purpose of having him check the [fol. 176] record here against the original. He, in response, filed in this Court the original judgment together with the accompanying appeal entries from which it appears that the record below is as certified."

Also in *Aycock* v. *Richardson*, 247 N.C. 234, Per Curiam, this Court said, "Moreover, the Clerk of this Court at its direction has obtained from the Clerk of Superior Court of Cabarru County a certificate in which he certifies that: I have examined the minutes in the above entitled action; that said minutes contain no entries of appeal either by the plaintiff or by the defendants."

This Honorable Court has supervisory powers over all of the inferior Courts of this State (Article IV, Section 8, Constitution of North Carolina), and if this Court is unwilling to indulge the presumption that the Clerk of the Municipal-County Court obeyed rather than disobeyed his duty in sending up the original papers to the Superior Court for a trial de novo, then appellants feel that this Honorable Court in the exercise of its supervisory powers should inquire into the fact of notice of appeal in the Courts below, since the actions of the Clerk of the Municipal-County Court were wholly within the control of that State official and beyond any control of these defendants.

3. There are involved in this case grave questions under the Constitution and Laws of the United States, including the duty of all State Courts to take judicial notice of and to consider themselves bound by said Constitution and Laws as interpreted by the Courts of the United States upon the identical facts involved in this case, and decision upon such questions should not be avoided merely because

of failure of the Clerk of Municipal-County Court to record on the original papers sent up to the Superior Court that the requisite notice of appeal had been given which gave him the authority to send up said papers and to docket said case on appeal. To have sent said original papers up for a trial de novo in the Superior Court without notice of appeal having been given by appellants would have been a violation of the duty of the Clerk to send papers only after due notice of appeal; and appellants should not be made the victims of any such alleged disobedience if it should appear to exist.

Wherefore, premises considered, appellants pray this [fol. 177] Honorable Court to indulge the presumption that the Clerk of Municipal-County Court would not have sent up the original papers for trial de novo unless due notice of appeal had been given by appellants in the Municipal-County Court, and that said appeal would not have been docketed and tried at the next term of court unless the Clerk had done his duty in sending up said appeal; and in the alternative appellants pray that, in the exercise of its supervisory powers over all inferior Courts in this State, this Honorable Court take appropriate steps to determine the facts concerning the giving of notice of appeal by these appellants in the Municipal-County Court.

Appellants further pray that the motion of the Attorney General to dismiss this appeal be in all things denied.

This the 2nd day of May, 1958.

Attorneys for Appellants.

[fol. 178] Verification

North Carolina
Forsyth County

Harold L. Kennedy, being first duly sworn, deposes and and (sic) says: That he is one of the attorneys for the defendants in the foregoing annexed Reply to Motion to Dismiss; that he has read and knows the contents thereof; that the things stated therein are true of his own knowledge, except those things alleged and stated upon information and belief, and as to those things he believes it to be true;

That he signs this verification as attorney for defendants because as attorney for defendants, he has more personal and intimate knowledge of the matter herein alleged, said matter being matter of law and of legal inference.

/s/ Harold L. Kennedy, Affiant.

Subscribed and sworn to before me this 3rd day of May, 1958.

/s/ Melinda L. Lash, Notary Public. My commission expires September 9, 1958.

(Seal)

A True Copy: /s/ Adrian J. Newton, Clerk of Supreme Court of North Carolina.

[fol. 182]

IN THE SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1958

No. 582

Eighteenth District

STATE

v.

PHILLIP COOKE, et al.

MOTION TO TAKE JUDICIAL NOTICE—Filed May 8, 1958

Upon the argument of this case on Tuesday, April 29, 1958 the appellants offered, solely for the convenience of the Court and in connection with the question of judicial notice certified copies of certain records in the United States Courts, concerning construction of the Constitution and Laws of the United States upon the identical facts involved in this appeal.

The Court seemed to regard said offer as one to submit evidence on appeal and questions from the Bench seemed to indicate to appellants the possibility that the judicial proceedings in the United States Courts involving the sub-

ject-matter of this case could not be considered by this Court unless they appeared of record as evidence in this case.

Under these circumstances, appellants make this motion respectfully requesting this Honorable Court to take judicial notice of the Constitution and Laws of the United States as interpreted by the United States Courts in *George Simkins, Jr. et al.* vs. *City of Greensboro et al.*, 149 Fed. Supp. 562, being No. 1058 in the United States District Court for the Middle District of North Carolina, affirmed by the Court of Appeals of the United States for the Fourth Circuit in No. 7450, *City of Greensboro et al.* vs. *George Simkins, Jr. et al.*, 246 Fed. 2nd 425.

Appellants respectfully suggest to this Honorable Court that the Courts of the United States in said proceedings have construed the Constitution and Laws of the United States in such a way as to make lawful the identical conduct on the part of these appellants which the Courts of North Carolina in this case below have held to be a crime under a statute of this State, although the contrary construction by the Courts of the United States was duly called to the attention of the State Courts below, it having [fol. 183] been held by the United States Courts that the Constitution and Laws of the United States protected and made lawful the identical conduct of these appellants which the State Courts below have held to constitute a crime under a North Carolina statute. Appellants contended below and here respectfully suggest to this Honorable Court that it was and is the duty of all State Courts to take judicial notice of the Constitution and Laws of the United States as construed by the Courts of the United States in said judicial proceedings identified above. As an example of the different construction placed upon the Constitution and laws of the United States upon the identical conduct sought to be made a crime by the State Courrs (sic) below in this case, these appellants quote the following from the opinion of the United States District Court in 149 Fed. Supp. 562:

> "The six plaintiffs presented themselves at the desk of the man in charge of the golf course and laid down 75¢ each and asked to play, the first named plaintiff

being a dentist and practicing his profession in Greensboro. But they were not given permission to play. They insisted on their right to play and played three holes. While playing the third hole, the manager came and ordered them to leave and they refused to go unless an officer arrested them. Whereupon the manager swore out a warrant charging each with trespass upon which they were tried, convicted and sentence to 30 days in jail, the Statutory limit, from which an appeal is pending in the Supreme Court of North Carolina."

"The Negroes have not only been denied the privilege of the golf course but there is no intention on the part of the defendants to permit them to do so unless they are compelled by order of court."

"This golf club permits white people to play without being members or otherwise, except it requires the prepayment of green fees. The plaintiffs here paid their fees, were forced off the course by being arrested for trespass. Everybody knows this was done because the plaintiffs were Negroes and for no other reason. This court can not ignore it."

"A decree will be entered declaring that these plaintiffs have been denied on account of their color, equal privileges to use the golf course owned by the City Board of Education and the City of Greensboro and operated by the Gillespie Park Golf Club, and permanently restraining the defendants from discriminating against plaintiffs and other members of their race on account of color, so long as the golf course is owned by these agencies and operated for the pleasure and health of the public, their agents, lessees, servants and employees."

[fol. 184] In connection with the duty of State Courts to take judicial notice of the Constitution and Laws of the United States as construed by the Courts of the United States, appellants respectfully quote the following from the opinion of this Honorable Court in the case of *Mangum* v. *Atlantic Coast Line Railway*, 188 N. C. 689:

"Other rules of the Interstate Commerce Commission make the railroad responsible for the design, construction and maintenance of locomotives and tenders, and all parts thereof, under its control.

It is not necessary for the plaintiff to plead or prove the aforementioned statutes as the Court will take judicial notice thereof.

In 25 Ruling Case Law, sec. 209, it is stated:

"Judicial notice will be taken of public acts of Congress, not only by the courts of the United States, but by the courts of the several states and territories. Federal statutes need not be pleaded in the state courts. In construing a Federal statute, a state court is bound by the construction placed on it by the Federal courts." Seaboard Air Line Railway Co. v. Duval, 225 U. S., p. 477.

A fortiori, judicial notice will be taken of the various provisions of the Constitution of the United States as interpreted by the Courts of the United States.

Wherefore, premises considered, appellants respectfully pray this Honorable Court to take judicial notice of the Constitution and Laws of the United States as construed by the United States District Court for the Middle District of North Carolina and the United States Court of Appeals for the Fourth Circuit in the judicial proceedings identified above.

This 7th day of May, 1958.

/s/ Annie Brown Kennedy, /s/ Harold L. Kennedy,
Attorneys for Defendants.

[fol. 185] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

No. 582—Guilford

PHILLIP COOKE, LEON WOLFE, GEORGE SIMKINS, JR., JOSEPH STURDIVANT, SAMUEL MURRAY, and ELIJAH H. HERRING, Appellants

v.

STATE OF NORTH CAROLINA

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed August 27, 1958

1. Notice is hereby given that Phillip Cooke, Leon Wolfe, George Simkins, Jr., Joseph Sturdivant, Samuel Murray, and Elijah H. Herring, the appellants above named, hereby appeal from the final order of the Supreme Court of North Carolina affirming and finding no error in the judgment of conviction and sentence of said appellants, which judgment and sentence were entered by the Superior Court of Guilford County, North Carolina, on February 10, 1958, and the opinion of the Supreme Court of North Carolina affirming and finding no error in said judgment of conviction and sentence having been filed in the office of the Clerk of the Supreme Court of North Carolina on June 4, 1958, and the final order pursuant to said opinion having been entered as of the same date as said opinion.

This appeal is taken pursuant to 28 USC Sec. 1257 (2).

Appellants have been tried twice upon two separate and successive sets of warrants in the Municipal-County Court of Greensboro, Guilford County, North Carolina, for the same acts of playing golf on the public municipal Gillespie Park Golf Course, the crime charged on each occasion being that of simple trespass under Section 14-134 of the General Statutes of North Carolina (1953). The first trial resulted in conviction and sentence to a fine of $15. On appeal and trial de novo in the Superior Court of Guilford County, North Carolina, there was a jury trial and verdict

of guilty and a sentence of 30 days in jail. On appeal to the Supreme Court of North Carolina the judgment of the Superior Court was arrested, not upon any ground set up by appellants, but because the Supreme Court found that the Superior Court lost jurisdiction and its actions were a nullity when it permitted the warrants to be amended to change the name of the prosecuting witness from Gillespie Park Golf Course to Gillespie Park Golf Club, Inc. No further action was taken either by the Supreme Court [fol. 186] or the Superior Court with reference to the original warrants and judgment and sentence in the Municipal-County Court.

Thereafter, on December 2, 1957, entirely new warrants, charging appellants with the same offense were issued in the Municipal-County Court of Greensboro, Guilford County, North Carolina. The trial in Municipal-County Court resulted again in conviction and the sentence was 30 days in jail, to be suspended upon the payment by each appellant of a fine of $1. Upon a trial de novo upon appeal to the Superior Court of Guilford County, North Carolina, there was a jury verdict of guilty and the Court's judgment and sentence of 15 days in jail. On appeal the Supreme Court of North Carolina affirmed and found no error in the trial, judgment and sentence.

Appellants are presently enlarged upon bail in the sum of $200 each and a stay of execution by a Justice of the Supreme Court of North Carolina.

II. The Clerk of the Supreme Court of North Carolina will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. The Record in this cause as printed and filed for use of the Supreme Court of North Carolina upon appeal during the Spring Term of 1958, No. 582, coming from the Superior Court of Guilford County, North Carolina, and all other papers which were before said Supreme Court upon said appeal.

2. The Opinion of the Supreme Court of North Carolina which was filed in this cause on June 4, 1958.

3. The final order affirming and finding no error in the proceedings of the Superior Court of Guilford County, entered as of June 4, 1958.

4. Any and all orders staying execution in this cause.

5. This Notice of Appeal to the Supreme Court of the United States, with Proof of Service of same.

III. The following questions are presented by this appeal:

1. Is Section 14-134 of the General Statutes of North Carolina (1953), as construed and applied by the State Courts in this case, unconstitutional under the Constitution of the United States, including the Supremacy Clause (Art. 6, Cl. 2), and also including the Fourteenth Amendment as interpreted by the United States District Court for the Middle District of North Carolina in George Simkins et al. v. City of Greensboro et al., 149 Fed. Supp. 562, [fol. 187] and by the Court of Appeals for the Fourth Circuit affirming in City of Greensboro et al. v. George Simkins et al. 246 Fed. 2d 425?

2. Could the State agencies in this case, namely, City of Greensboro, Greensboro City Board of Education, and Gillespie Park Golf Club, Inc., consistent with the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States, promulgate written regulations converting the public municipal Gillespie Park Golf Course, originally constructed with the Federal Government providing 65 per cent of the cost, into a private-club membership-only golf course, excluding all citizens who did not meet the membership rules? and do the membership rules as set out in the record thus limiting the use and enjoyment of this public municipal golf course, having been promulgated by State agencies, violate the Equal Protection Clause of the Fourteenth Amendment? and, said State agencies having adopted a written rule making eligible to play on said public municipal golf course "members in good standing of other golf clubs," could the State agencies operating the golf course, consistent with the Equal Protection Clause of the Fourteenth Amendment,

arbitrarily in practice limit use and enjoyment of the golf course to those "members in good standing of other golf clubs," whose golf clubs were members of the Carolina Golf Association?

3. Was it the duty of the State Courts in this case to accept as true the allegations asserting appellants' Federal rights in their motion to quash the warrants and in their motion to set aside the verdict and for judgment notwithstanding the verdict, in view of the fact that the State did not answer to deny or controvert any of said allegations?

4. In its opinion in this case the Supreme Court of North Carolina having said, with reference to the Federal case cited in Question No. 1 above, that "Our knowledge of the facts in that case is limited to what appears in the published opinion," and having also said that "It would appear from the opinion that the entry involved in this case was one incident on which plaintiffs there relied to support their assertion of unlawful discrimination," was it the duty of the State Courts in this case, under the Supremacy Clause (Art. 6, Cl. 2) of the Constitution of the United States, to consider and give effect to all of the facts set forth in said opinion of the Federal Court, and having taken judicial notice of said opinion, was it also the duty of [fol. 188] the State Courts under the Supremacy Clause to take judicial notice of the Federal Court's Findings of Fact, Conclusions of Law, and Declaratory Judgment, in order to determine the extent to which the acts and conduct held by the State Courts to be a crime in this case were held by the Federal Courts to be protected by the Fourteenth Amendment to the Constitution of the United States?

5. The Supreme Court of North Carolina having held on May 7, 1958 in State v. Perry, 248 N. C. 334, that the unconstitutionality of a jury panel under the Constitution of the United States could be shown by evidence upon a motion to quash the indictment, was it a discrimination against the Federal rights asserted by appellants in this case for the State Courts to deny the request made by the appellants in their motion to quash the warrants and again in their motion to set aside the verdict, for an opportunity

to present the record in the Federal case cited in Question No. 1 above upon the hearing of said motions?

6. Was it a discrimination against and an infringement upon the Federal rights asserted by appellants in this case for the State Courts to refuse to give effect to Finding of Fact No. 30 and Finding of Fact No. 33 in the Federal case cited in Question No. 1 above, both of which Findings of Fact were quoted verbatim in appellants' motion to set aside the verdict, and the State not having answered to deny or controvert the allegations of said motion in any way?

7. The Supreme Court of North Carolina having held consistently prior to this case that said Section 14-134 of the General Statutes of North Carolina did not apply to public lands but only to "the possession or right of possession of real estate privately held," (State v. Clyburn, 247 N. C. 455), was it a discrimination against the Federal rights asserted by appellants for the North Carolina Supreme Court to depart from this rule and hold that the statute did apply to the alleged trespass upon the public municipal golf course involved in this case?

8. The Supreme Court of North Carolina having approved in its opinion in this case the charge to the jury that "if a party entering upon the land has a legal right to do so, of course he may not be convicted of a trespass," and the Declaratory Judgment in the Federal case cited in Question No. 1 above having declared that the interference with and causing appellants to be arrested for playing on the golf course "was done solely because of the race [fol. 189] and color of the" appellants "and constitutes a denial of their constitutional rights," (said Declaratory Judgment being quoted verbatim in appellants' motion to set aside the verdict, and the State having not answered to deny or controvert said motion), was it a violation of the duty of the State Courts under the Supremacy Clause, and of the rights of appellants under the Fourteenth Amendment of the Constitution of the United States for the Supreme Court of North Carolina to hold in this case that the State Courts were not concluded by the Federal Court's determination of the "constitutional rights" of the appel-

lants, and to submit to the State's jury the determination of this Federal "legal right" of appellants under the Constitution of the United States to play on this public municipal golf course?

9. The Supreme Court of North Carolina having gone outside the record before it to find in its opinion in this case the true fact concerning the Federal case cited in Question No. 1 above that "defendants had the record in that case identified," did the Equal Protection Clause of the Fourteenth Amendment require the Court to note the further true fact that the records in said Federal case were in fact identified as "Defendants' Exhibits 6 and 7," in order that the Court might see the further true fact that said Exhibits 6 and 7 were in fact offered in evidence and their admission refused by the Trial Judge, as shown on Page 77 of the printed record before the Supreme Court of North Carolina?

10. Appellants having been tried twice upon two separate and different sets of warrants for the same alleged offense in the Municipal-County Court of Greensboro, Guilford County, North Carolina, and the first set of warrants and the conviction and sentence thereunder being still outstanding and undisposed of at the time of the issuance of the second set of warrants and the trial and conviction thereunder, does the second trial and conviction and sentence amount to the kind of double jeopardy which the 14th Amendment forbids as a denial of due process?

Dated this 27th day of August, 1958.

/s/ Harold L. Kennedy, /s/ C. O. Pearson.

[fol. 190] Proof of Service

I, T. W. Burton, Assistant Attorney General of the State of North Carolina, hereby acknowledge receipt of a copy of the foregoing Notice of Appeal to the Supreme Court of the United States, this the 27 day of August, 1958.

/s/ T. W. Burton

[fol. 191]

IN THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

STATE

v.

PHILLIP COOKE, LEON WOLFE, GEORGE SIMKINS, JR., JOSEPH STURDIVENT, SAMUEL MURRAY, and ELIJAH H. HERRING

Appeal docketed	5 April 1958
Case argued	29 April 1958
Opinion filed	4 June 1958
Final Judgment entered	4 June 1958

I, Adrian J. Newton, Clerk of the Supreme Court of North Carolina, do hereby certify the following is a full, true and perfect copy of the record and proceedings in the above-entitled case as the same now appear from the originals on file in my office:

1. Mimeographed record of the case — pages 1-107
2. Mimeographed copy of the brief of the defendants — pages 108-130
3. Mimeographed copy of the brief for the State, filed by the Attorney General — pages 131-146
4. The opinion of the Supreme Court of North Carolina filed June 4, 1958 — pages 147-161
5. Judgment of the Supreme Court of North Carolina in accordance with the opinion — page 162
6. Petition to stay execution of judgment dated July 12, 1958 — pages 163-164

7. Order of Stay pending determination on petition for writ of certiorari by the Supreme Court of the United States dated July 12, 1958 pages 165-166

8. Order of Stay pending appeal dated August 28, 1958 pages 167-168

9. Motion and Affidavit suggesting diminution of the record, filed April 29, 1958 pages 169-171

10. Answer to motion suggesting diminution of the record by the Attorney General and motion to dismiss appeal, filed April 30, 1958 pages 172-174

11. Defendant's reply to motion to dismiss filed May 7, 1958 pages 175-178

[fol. 192]

12. Memorandum of Additional Authorities by the State pages 179-181

13. Motion to take judicial notice, filed May 8, 1958 pages 182-184

14. Notice of appeal to the Supreme Court of the United States, filed Aug. 27, 1958 pages 185-190

I further certify that the rules of this Court prohibit the filing of petitions to rehear in criminal cases.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of North Carolina, this the ninth day of October, 1958.

/s/ Adrian J. Newton, Clerk, Supreme Court of the State of North Carolina.

(Seal)

[fol. 193]

SUPREME COURT OF THE UNITED STATES

No. 466, October Term, 1958

PHILLIP COOKE, LEON WOLFE, GEORGE SIMKINS, et al.,
Appellants,

vs.

STATE OF NORTH CAROLINA

Appeal from the Supreme Court of the State of North Carolina.

ORDER POSTPONING JURISDICTION—January 12, 1959

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

Mr. Justice Frankfurter took no part in the consideration or decision of this case.

LE COPY

FILED
OCT 22 1958
JAMES R. BROWNING, Clerk

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. [redacted]

PHILLIP COOKE, LEON WOLFE, GEORGE SIMKINS, JR., JOSEPH STURDIVENT, SAMUEL MURRAY, and ELIJAH H. HERRING, Appellants

vs.

STATE OF NORTH CAROLINA

Appeal from the Supreme Court of the State of North Carolina

STATEMENT AS TO JURISDICTION

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1958

No._____

Phillip Cooke, Leon Wolfe, George Simkins, Jr., Joseph Sturdivent, Samuel Murray, and Elijah H. Herring,

Appellants

v

State of North Carolina

Appeal from the Supreme Court of the State of North Carolina

STATEMENT AS TO JURISDICTION

1. The above named appellants respectfully file this Statement as to Jurisdiction pursuant to Rule 13 and Rule 15 of the Revised Rules of the Supreme Court of the United States.

(a) OPINIONS IN THE COURT BELOW

The Opinion of the Supreme Court of North Carolina delivered upon rendering the judgment from which this appeal is taken is reported in State v Cooke et al., 248 NC 485, 103 SE 2d 846. Said Opinion is attached hereto as Appendix "A" and said Judgment is hereto attached as Appendix "B". The Opinion of the Supreme Court of North Carolina upon a former trial upon another set of warrants charging the identical trespass upon Gillespie Park Municipal Golf Course is reported in State v Cooke et al., 246 NC 518, 98 SE 2d 885. That Opinion is hereto attached as Appendix "C".

(b) GROUNDS ON WHICH JURISDICTION IS INVOKED

(i) This is a criminal prosecution commenced in the Municipal-County Court of Greensboro, Guilford County, North Carolina, alleging a trespass by the above named appellants upon the Municipal Gillespie Park Golf Course. The warrants charging simple trespass were issued under Section 14-134 of the General Statutes of North Carolina (1953).

(ii) The judgment of the Supreme Court of North Carolina appealed from in this case was entered and dated as of June 4, 1958, at the same time of the filing of the Opinion mentioned as Appendix "A" above. Said Judgment affirmed and found no error in the judgment of conviction and sentence by the Superior Court of Guilford County, North Carolina, entered on February 10, 1958, upon a trial de novo on appeal from a judgment of conviction and sentence in the Municipal-County Court of Greensboro. The sentence appealed from is 15 days in jail for each of the above named appellants.

No Petition for Rehearing in a criminal case is permitted in the Supreme Court of North Carolina. State v. Jones, 69 NC 14 (16), State v Council, 129 NC 371 (511), 39 SE 814.

The Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of North Carolina on August 27, 1958, and a copy is hereto attached as Appendix "D".

(iii) The statutory provision believed to confer jurisdiction of this appeal on the Supreme Court of the United States is 28 USC 1257 (2).

(iv) It is believed by appellants that the following cases sustain the jurisdiction of this Court in this case:

Marsh v Alabama, 326 US 501, 509, 90 L ed 265, 270, 66 S Ct 276, 280.

Niemotko v Maryland, 340 US 268, 271, 95 L ed 267, 270, 71 S Ct 325, 327.

Railway Employees' Department etc. v Hanson, 351 US 225, 232, 100 L ed 1112, 1130, 76 S Ct 714.

Franklin National Bank v New York, 347 US 373, 98 L ed 767, 74 S Ct 550.

Public Utilities Commission of California v United States, 355 US 534, 2 L ed 2d 470, 478, 78 S Ct 446.

Smith v O'Grady, Warden, 312 US 329, 331, 85 L ed 859, 61 S Ct 572.

Lilly v Grand Trunk Western Ry Co., 317 US 481, 488, 87 L ed 411, 417, 63 S Ct 347.

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Williams v Georgia, 349 US 375, 99 L ed 1161, 75 S Ct 814.

Aycock v Richardson, 247 NC 234, 100 SE 2d 379.

Mason v Commissioners of Moore, 229 NC 626, 627, 51 SE 2d 6.

NAACP v Alabama, 357 US 449, 2 L ed 2d 1488, 1495, 78 S Ct 1163.

State v Clyburn, 247 NC 455, 458, 101 SE 2d 295.

Lambert v California, 355 US 225, 2 L ed 2d 228, 231, 78 S Ct 240.

Eubanks v Louisiana, 356 US 584, 2 L ed 2d 991, 994, 78 S Ct 970.

Hoag v New Jersey, 356 US 464, 2 L ed 2d 913, 917, 78 S Ct 829.

Brock v North Carolina, 344 US 424, 429, 97 L ed 456, 460, 73 S Ct 349.

Sweezy v New Hampshire, 354 US 234, 1 L ed 2d 1311, 77 S Ct 1203.

Pennsylvania v. Board of Directors etc., 353 US 230, 1 L ed 2d 792, 77 S Ct 806.

(v) The validity under the Constitution of the United States of Section 14-134 of the General Statutes of North Carolina (1953), as construed and applied by the State Courts in this case, is drawn in question upon this appeal, and said Section 14-134, which was read to the jury by the Trial Judge (Page 78 of printed Record below*), reads as follows:

> "If any person, after being forbidden to do so, shall go or enter upon the lands of another without a license therefor, he shall be guilty of a misdemeanor and on conviction shall be fined not exceeding fifty dollars or imprisoned not more than thirty days."

The acts of appellants held by the State Courts to be a crime under this statute were held by Declaratory Judgment of the United States District Court for the Middle District of North Carolina, affirmed by the Court of Appeals for the Fourth Circuit, to be the "constitutional rights" of the appellants.

(c) QUESTIONS PRESENTED BY THIS APPEAL

The following questions are presented by this Appeal:

1. Is Section 14-134 of the General Statutes of North Carolina (1953), as construed and applied by the State Courts in this case, unconstitutional under the Constitution of the United States, including the Supremacy Clause (Art. 6, Cl. 2), and also including the Fourteenth Amendment as interpreted by the United States District Court for the Middle District North Carolina in George Simkins et al. v City of Greensboro et al., 149 Fed. Supp. 562, and by the Court of Appeals for the Fourth Circuit affirming in City of Greensboro et al. v. George Simkins et al. 246 Fed. 2d 425?

2. Could the State agencies in this case, namely, City of Greensboro, Greensboro City Board of Education, and Gillespie Park Golf Club, Inc., consistent with the Equal Protection Clause of the Fourteenth

*See note on page 41.

Amendment of the Constitution of the United States, promulgate written regulations converting the public municipal Gillespie Park Golf Course, originally constructed with the Federal Government providing 65 per cent of the cost, into a private-club membership-only golf course, excluding all citizens who did not meet the membership rules? and do the membership rules as set out in the record thus limiting the use and enjoyment of this public municipal golf course, having been promulgated by State agencies, violate the Equal Protection Clause of the Fourteenth Amendment? and, said State agencies having adopted a written rule making eligible to play on said public municipal golf course "members in good standing of other golf clubs," could the State agencies operating the golf course, consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily in practice limit use and enjoyment of the golf course to those "members in good standing of other golf clubs" whose golf clubs were members of the Carolina Golf Association?

3. Was it the duty of the State Courts in this case to accept as true the allegations asserting appellants' Federal rights in their motion to quash the warrants and in their motion to set aside the verdict and for judgment notwithstanding the verdict, in view of the fact that the State did not answer to deny or controvert any of said allegations?

4. In its opinion in this case the Supreme Court of North Carolina having said, with reference to the Federal case cited in Question No. 1 above, that "Our knowledge of the facts in that case is limited to what appears in the published opinion," and having also said that "It would appear from the opinion that the entry involved in this case was one incident on which plaintiffs there relied to support their assertion of unlawful discrimination," was it the duty of the State Courts in this case, under the Supremacy Clause (Art. 6, Cl. 2) of the Constitution of the United States, to consider and give effect to all of the facts set forth in

said opinion of the Federal Court, and having taken judicial notice of said opinion, was it also the duty of the State Courts under the Supremacy Clause to take judicial notice of the Federal Court's Findings of Fact, Conclusions of Law, and Declaratory Judgment, in order to determine the extent to which the acts and conduct held by the State Courts to be a crime in this case were held by the Federal Courts to be protected by the Fourteenth Amendment to the Constitution of the United States?

5. The Supreme Court of North Carolina having held on May 7, 1958 in State v. Perry, 248 N. C. 334, that the unconstitutionality of a jury panel under the Constitution of the United States could be shown by evidence upon a motion to quash the indictment, was it a discrimination against the Federal rights asserted by appellants in this case for the State Courts to deny the request made by the appellants in their motion to quash the warrants and again in their motion to set aside the verdict, for an opportunity to present the record in the Federal case cited in Question No. 1 above upon the hearing of said motions?

6. Was it a discrimination against and an infringement upon the Federal rights asserted by appellants in this case for the State Courts to refuse to give effect to Finding of Fact No. 30 and Finding of Fact No. 33 in the Federal case cited in Question No. 1 above, both of which Findings of Fact were quoted verbatim in appellants motion to set aside the verdict, and the State not having answered to deny or controvert the allegations of said motion in any way?

7. The Supreme Court of North Carolina having held consistently prior to this case that said Section 14-134 of the General Statutes of North Carolina did not apply to public lands but only to "the possession or right of possession of real estate privately held," (State v. Clyburn, 247 N. C. 455), was it a discrimination against the Federal rights asserted by appellants

for the North Carolina Supreme Court to depart from this rule and hold that the statute did apply to the alleged trespass upon the public municipal golf course involved in this case?

8. The Supreme Court of North Carolina having approved in its opinion in this case the charge to the jury that "if a party entering upon the land has a legal right to do so, of course he may not be convicted of a trespass," and the Declaratory Judgment in the Federal case cited in Question No. 1 above having declared that the interference with and causing appellants to be arrested for playing on the golf course "was done solely because of the race and color of the" appellants "and constitutes a denial of their constitutional rights," (said Declaratory Judgment being quoted verbatim in appellants' motion to set aside the verdict, and the State having not answered to deny or controvert said motion), was it a violation of the duty of the State Courts under the Supremacy Clause and of the rights of appellants under the Fourteenth Amendment of the Constitution of the United States for the Supreme Court of North Carolina to hold in this case that the State Courts were not concluded by the Federal Court's determination of the "constitutional rights" of the appellants, and to submit to the State's jury the determination of this Federal "legal right" of appellants under the Constitution of the United States to play on this public municipal golf course?

9. The Supreme Court of North Carolina having gone outside the record before it to find in its opinion in this case the true fact concerning the Federal case cited in Question No. 1 above that "defendants had the record in that case identified," did the Equal Protection Clause of the Fourteenth Amendment require the Court to note the further true fact that the records in said Federal case were in fact identified as "Defendants' Exhibits 6 and 7," in order that the Court might see the further true fact that said Exhibits 6 and 7 were in fact offered in evidence and their admission

refused by the Trial Judge, as shown on Page 77 of the printed record before the Supreme Court of North Carolina?

10. Appellants having been tried twice upon two separate and different sets of warrants for the same alleged offense in the Municipal-County Court of Greensboro, Guilford County, North Carolina, and the first set of warrants and the conviction and sentence thereunder being still outstanding and undisposed of at the time of the issuance of the second set of warrants and the trial and conviction thereunder, does the second trial and conviction and sentence amount to the kind of double jeopardy which the 14th Amendment forbids as a denial of due process?

(d) STATEMENT OF THE CASE

Appellants have been tried twice upon two separate and successive sets of warrants in the Municipal-County Court of Greensboro, Guilford County, North Carolina, for the same identical acts of playing golf on the public Municipal Gillespie Park Golf Course. In between these two trials appellants were compelled to defend bills of indictment in the Superior Court of Guilford County, North Carolina, for the same identical acts of playing golf on said golf course. All of said warrants and indictments charged that said same identical acts of playing golf were a crime under Section 14-134 of the General Statutes of North Carolina (1953), which statute is quoted above in (v).

After said first trial upon said first set of warrants and while the case was pending on appeal in the Supreme Court of North Carolina, the United States District Court for the Middle District of North Carolina, in Civil Case No. 1058, George Simkins et al. v City of Greensboro et al., entered its Declaratory Judgment covering said same identical acts of playing golf on the public Municipal Gillespie Park Golf Course. Said Declaratory Judgment appears verbatim on Page 92 of the printed Record below and reads as follows:

"It is now ordered, adjudged and decreed that

defendants have unlawfully denied the plaintiffs as residents of the City of Greensboro, North Carolina, the privileges of using the Gillespie Park Golf Course, and that this was done solely because of the race and color of the plaintiffs, and constitutes a denial of their constitutional rights, and unless restrained will continue to deny plaintiffs and others similarly situated."

The Supreme Court of North Carolina arrested judgment on the judgment of conviction and sentence coming from the de novo trial in the Superior Court of Guilford County, North Carolina, under said first said of warrants, not upon any ground of appeal set up by appellants, but because the Court found that the Superior Court lost jurisdiction and its actions became a nullity when it permitted the warrants to be amended to change the name of the prosecuting witness from Gillespie Park Golf Course to Gillespie Park Golf Club, Inc. No further action was taken either by the Supreme Court or the Superior Court of Guilford County with reference to said first set of warrants, but the Supreme Court did say that the appellants could "now be tried under the original warrant since the court was without authority to allow the amendment." (246 NC 521).

After the United States District Court for the Middle District of North Carolina had entered its said Declaratory Judgment and after it had been affirmed by the Court of Appeals for the Fourth Circuit and had become final, at the October 21st, 1957, Term of the Superior Court of Guilford County, North Carolina, appellants were indicted and compelled to defend against indictments charging the identical trespass for the identical acts covered by said first set of warrants and also covered by said Declaratory Judgment of the said Federal Court. Said indictments appear on Pages 33 to 39 of the printed Record below. When said indictments were called for trial on December 2, 1957, the State took "a Nol Pros with leave" in all of said indictments. (Page 39 of printed Record below).

Appellants were then immediately arrested on December 2, 1957, on a new set of warrants in said Municipal-County

Court charging the identical trespass for the identical acts covered by said first set of warrants and also by said indictments and also by said Declaratory Judgment of said Federal Court.

Appellants were tried and convicted and sentenced in said Municipal-County Court upon said second set of warrants, and upon appeal were tried, convicted and sentenced to 15 days in jail in a de novo trial in Superior Court of Guilford County, North Carolina. The Supreme Court of North Carolina affirmed and found no error and this appeal is from the final judgment of the Supreme Court of North Carolina mentioned above as Appendix "B".

The effect of the proceedings in the Federal case of George Simkins et al. v City of Greensboro et al., 149 Fed Supp 562, affirmed in City of Greensboro et al. v George Simkins et al., 246 Fed 2d 425, is one of the crucial issues in this case. The Supreme Court of North Carolina in its Opinion in this case said that the United States District Court's Opinion in said Simkins case was before the State Courts and that "Our knowledge of the facts in that case is limited to what appears in the published opinion." (See Appendix "A", Page 50.)

Appellants, therefore, insert said Opinion of said United States District Court, as follows:

OPINION

Hayes, District Judge:

The City of Greensboro and the Greensboro City Board of Education concede that they cannot own and operate the Gillespie Park Golf Course for the public and exclude the plaintiffs and other Negro citizens of Greensboro from these privileges on account of their color.

Although the golf course has been available to the public for many years, whether by design or otherwise, Negroes have been denied the enjoyment of the privilege.

The City of Greensboro, before Brown v. Board of Education, 347 U.S. 483, in an effort to comply with Plessy v. Ferguson, 163 U.S. 537, erected in the City of Greensboro a nine-hole golf course for Negroes, known as Nocho Park Golf Course, but it cannot be deemed the equivalent of an 18-hole golf course like Gillespie Park course which was restricted to white people.

The Board of Education leased the land it did not need for school purposes at the time to the City of Greensboro. Through Works Progress Administration, which furnished 65% of the cost, the City of Greensboro built the last nine holes and agreed not to sell or lease for private use this public property during its life or usefulness.

Some of the Negro citizens applied to the City authorities for permission to play on the Gillespie Park course in 1949 and, because of opposition on the part of local citizens against Negroes playing on the course, after some negotiation, the City of Greensboro and City Board of Education entered into a lease contract whereby the entire golf course was leased to Gillespie Park Golf Club, a non-profit corporation which was organized solely for the purpose of taking the lease and maintaining and operating the course as a public golf course. G.S. 55-11

It is true the directors met with a quorum at first and fixed $60.00 for annual membership which permitted them to play without paying additional fees; also authorized $1.00 membership who would pay $1.25 greens fees on holidays and weekends, and 75 cents on other days.

The records of the corporation do not disclose sufficient data to show if rules were really established and enforced in respect to membership. The evidence does clearly show that white people were allowed to play by paying the greens fees without any questions and without being members. When Negroes asked to play,

they were told they would have to be members before they could play and it clearly appears that there was no intention of permitting a Negro to be a member or to allow him to play, solely because of his being a Negro.

The six plaintiffs presented themselves at the desk of the man in charge of the golf course and laid down 75 cents each and asked to play, the first named plaintiff being a dentist and practicing his profession in Greensboro. But they were not given permission to play. They insisted on their right to play and played three holes. While playing the third hole, the manager came and ordered them to leave, and they refused to go unless an officer arrested them. Whereupon the manager swore out a warrant charging each with trespass upon which they were tried, convicted and sentenced to 30 days in jail, the Statutory limit, from which an appeal is pending in the Supreme Court of North Carolina.

The Negroes have not only been denied the privilege of the golf course, but there is no intention on the part of the defendants to permit them to do so unless they are compelled by order of court.

This case presents two questions for determination. First are plaintiffs, being citizens and taxpayers of the City of Greensboro, entitled to the privilege of playing on the defendant's golf course as long as it is owned and used for the convenience of the citizens of Greensboro? Second. Can the defendants avoid giving equal treatment to the plaintiffs in the use of the facility by leasing it to a private corporation or can the lessee deny plaintiffs the right to play solely on account of color and thereby accomplish a result which is denied to the owner.

It is conceded that the defendants ordinarily are not required to furnish a golf course for its citizens. If, however, it undertakes to do it out of the public treasury, it cannot constitutionally furnish the facility to a

part of its citizens and deny it to others similarly situated.

The plaintiffs as citizens of the City of Greensboro are entitled to the equal protection of the law and cannot be deprived of their rights solely on account of color. The doctrine of Plessy v. Ferguson, supra, of equal but separate facility has been over-ruled in Brown v. Board of Education, supra.

Before Brown v. Board of Education, supra, the Supreme Court held that the election laws of the State could not be delegated to a political organization and empower it to deny Negroes the right to participate in the primary, and the action of such an agency was State action within the meaning of the Fourteenth Amendment and that the discrimination against the Negroes violated the Amendment. Nixon v. Condon, 286 U.S. 73. The members of the Supreme Court who declared that law were Chief Justice Hughes, and Associate Justices Brandeis, Stone, Roberts and Cardozo. It is appropriate to quote from Justice Cardozo's opinion:

"The test is whether they are to be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action.

"With the problem thus laid bare and its essentials exposed to view, the case is seen to be ruled by Nixon v. Herndon, supra. Delegates of the States's power have discharged their official functions in such a way as to discriminate invidiously between white citizens and black. Ex parte Virginia, supra; Buchanan v. Warley, 245 U.S. 60, 77. The Fourteenth Amendment, adopted as it was with special solicitude for the equal protection of members of the Negro race, lays a duty upon the court to level by its judgment these barriers of color."

To the same effect is Rice v. Elmore, 165 F. 2d 387 (4CCA).

The Fourth Circuit Court has ruled that public parks are controlled by the same principles of constitutional law as are controlling in public education. Dawson v. Baltimore, 220 Fed. 2d 386, affirmed 350 U.S. 877. Again that court held in Department of Conservation v. Tate, 231 Fed. 2d 615, that citizens of the State have right to use parks thereof without discrimination on ground of race; that these rights cannot be abridged by leasing parks with ownership being retained by the State. Derrington v. Plummer 5CCA-240 F. 2d, 922.

Judge Moore in Lawrence v. Hancock, 76 F. Supp. 1004, in a similar situation said:

"It is not conceivable that a city can provide the ways and means for a private individual or corporation to discriminate against its own citizens. Having set up the swimming pool by the authority of the legislature, the city, if the pool is operated, must operate it itself, or, if leased, must see that it is operated without any such discrimination."

The brief filed by the City of Greensboro contains this significant statement in its statement of facts:

"In December, 1955, six of ten plaintiffs in this action were denied the use of Gillespie Park Golf Course by employees of Gillespie Park Golf Club, Inc. That same month the City Council instructed the City Manager to proceed forthwith to receive bids for the sale of Gillespie Park Course and upon such sale to close the Nocho Park course. The land upon which the latter is situated is to be used for governmental purposes and is not to be sold."

The facts show that the City is still "in the saddle" so far as real control of the park is concerned and that the so-called lease can be disregarded, if and when, the City decides to do it. It also lends powerful weight to the inference that the lease was resorted to in the first instance to evade the City's duty not to discriminate against any of its citizens in the enjoyment in the

use of the park. The threatened sale is the procedure pursued in Clark v. Flory, 141 F. Supp. 248; affirmed in 237 Fed. 2d. 597.

The City of Greensboro contends that Holmes v. Atlanta, 350 U.S. 879; Hayes v. Crutcher, 137 F. Supp. 853; Augustus v. Pensacola, Fed. Supp. , N. D. Fla., and Holley v. Portsmouth, Fed. Supp. , (E.D. Va.) are inapplicable because they dealt with anticipated leases while in the instant case the lease existed before this suit was brought. It further contends that the lease is valid under the North Carolina law and therefore the valid existing lease "freezes" the status quo and leaves the court without power to do anything. If this logic is sound constitutional rights are a delusion and a snare. Such hitherto sacred rights can not be abridged by a mere lease between the city and a third party and the courts are not made impotent to afford relief. To hold otherwise would open a Pandora's box by which governmental agencies could deprive citizens of their constitutional rights by the artifice of a lease. If the lessee desires to continue to operate the golf course, it must do so without discrimination against the citizens of Greensboro. This public right can not be abridged by the lessee so long as the course is available to some of the citizens as a public park, it can not be lawfully denied to others solely on account of race.

The private corporation challenges the right of plaintiffs here because it contends they have not exhausted their administrative remedies, relying on Carson v. Warlick, 238 F. 2d. 724, and other cases dealing with enrollment in educational institutions. These cases are not in point. This golf club permits white people to play without being members, or otherwise, except it requires the prepayment of green fees. The plaintiffs here paid their fees, were forced off the course by being arrested for trespass. Everybody knows this was done because the plaintiffs were Negroes and for no other reason. This court can not ignore it. More-

over, there existed no known and uniform procedure of an administrative nature to be exhausted by plaintiffs. Admittance to a park or golf course is unlike enrolling in an educational institution.

A decree will be entered declaring that these plaintiffs have been denied on account of their color, equal privileges to use the golf course owned by the City Board of Education and the City of Greensboro and operated by the Gillespie Park Golf Club, and permanently restraining the defendants from discriminating against plaintiffs and other members of their race on account of color, so long as the golf course is owned by these agencies and operated for the pleasure and health of the public, their agents, lessees, servants and employees.

The court invited counsel for the respective parties to confer and to suggest to the court the best practical way to make effective the decree, in the event the plaintiffs prevailed. The final decree will be deferred a short time to get the result of this conference.

Citizenship in the United States imposes uniform burdens, such as paying taxes and bearing arms for the preservation and operation of our government. In like manner whatever advantages or privileges one citizen in the United States may enjoy through his liberty becomes the constitutional right of each citizen and without regard to race, color or creed. These principles of law have been fully and elaborately established in the Fourth Circuit Court of Appeals and by the Supreme Court of the United States and must be adhered to in this case.

This the 18th day of March, 1957.

/s/ Johnson J. Hayes
United States District Judge

Raising of Federal Questions Below

Appellants first raised Federal questions sought to be reviewed by this appeal by a written motion to quash the war-

rants in Municipal-County Court. The State did not answer the allegations of the motion. The Supreme Court of North Carolina said in its Opinion in this case: "Defendants moved in the Municipal-County Court to quash the warrants. Their motions were overruled. They then entered pleas of not guilty." (Appendix "A" attached hereto, Page 42.)

Appellants renewed these written motions to quash in the Superior Court and the State did not answer the allegations of the motion. The Supreme Court of North Carolina said in its Opinion in this case: "Before pleading to the merits in the Superior Court, defendants renewed their motions to quash as originally made in the Municipal-County Court. The motions made in apt time were overruled by the court." (Appendix "A" attached hereto, Page 43.)

The written motion to quash is at Pages 28 to 32 of the printed Record below. The following is quoted from Pages 28 to 30:

Motion to Quash

Now come the defendants, and each of them all being Negro citizens of Greensboro, North Carolina, through counsel, and make the following Motion:

That the warrants in the above-titled cause charging these defendants, and each of them with simple trespass based on GS 14-134 be quashed for the reason that GS 14-134 is hereby being unconstitutionally applied to these defendants, on the following grounds:

1. The State of North Carolina in this prosecution is, contrary to the Supremacy Clause of the United States Constitution, attempting to make a crime out of specific acts and conduct which both the United States District Court for the Middle District of North Carolina and the United States Court of Appeals for the Fourth Circuit have specifically held to be protected by the Fourteenth Amendment to the Constitution of the United States. In support of this assertion the defendants show to the Court the following:

(a) Based upon the specific facts and conduct alleged by the State to be a crime in this case, these defendants brought Civil Action No. 1058 in the United States District Court for the Middle District of North Carolina, praying for a declaratory judgment and a decree enjoining the prosecution witnesses and the City of Greensboro and the Greensboro City Board of of Education from interfering with the defendants and all other Negroes similarly situated from playing golf on the Gillespie Park Golf Course.

(b) A full hearing was held before United States District Judge Johnson J. Hayes, who on April 24, 1957, found specifically that the prosecuting witnesses and the City of Greensboro had refused to permit these defendants to play golf "primarily because of their color" (Finding of Fact No. 33), and concluded as a matter of law that these defendants "and other Negroes similarly situated cannot be denied on account of race, the equal privileges to the park, notwithstanding the lease." In addition to his Findings of Fact and Conclusion of Law, Judge Hayes filed an opinion in the case and entered a "decree and injunction" enjoining the prosecuting witnesses and the City of Greensboro and the Greensboro City Board of Education from interfering with these defendants in playing golf on the Gillespie Park Golf Course. The prosecuting witnesses and the City of Greensboro appealed and this decree was subsequently affirmed by the United States Court of Appeals for the Fourth Circuit.

(c) These defendants have subpoenaed the Clerk of the United States District Court for the Middle District of North Carolina to bring to this trial the full record and judgment roll in said case and respectfully request an opportunity to offer this evidence upon the hearing of this motion.

(d) Defendants respectfully urge the Court to receive and consider the record and judgment roll in the Federal case and after such consideration to estop the State and the prosecuting witnesses from proceeding.

further with this prosecution. To permit this prosecution to proceed would be in effect to nullify and render ineffectual the judgment and decree of the United States Courts contrary to the Supremacy Clause of the United States Constitution and such prosecution would violate the rights of these defendants and laws of the United States, including the Fourteenth Amendment.

The Supreme Court of North Carolina in its Opinion in this case held that the proceedings in the Federal Court case of Simkins v Greensboro, supra, with the exception of the Opinion, could not be shown on the motion to quash for the reason that the record of such proceedings, except the Opinion, was "evidence aliunde the record." But, with reference to the allegations in the written motion to quash, the Supreme Court of North Carolina did say: "Since none of the reasons nor all combined sufficed to sustain the motion to quash, the court correctly overruled the motion and put the defendants on trial for the offense with which they were charged." (Appendix "A", hereto attached, Page 45.)

Trial Court Refused to Admit Federal Records

On Page 14 of appellants' brief before the Supreme Court of North Carolina in this case is the following assignment of error: "The Court erred in refusing to admit defendants' Exhibits 6 and 7, as set out in Exception No. 22. These exhibits were the decrees, the findings of fact, conclusions of law and opinion of the Federal District Court in the Simkins case and the opinion of the Court of Appeals, Fourth Circuit, in the same case." (See Transcript of Record, Page 121.) The offer of these Exhibits 6 and 7 and the refusal of the Trial Court to admit them and the Exception No. 22 all appear on Page 77 of the printed Record below.

The Record is silent as to the identification of these Federal Court records as Exhibits 6 and 7, but the Supreme Court of North Carolina says in its Opinion in this case the following with reference to said Federal Court records: "Although the defendants had the record in that case identified, they did not offer it in evidence." (Appendix "A" hereto attached,

Page 50). The only document other than appellants' brief mentioned above, which shows the identification of the Federal Court records, so far as appellants know, is the Official Court Reporter's Transcript of the Testimony, which shows on Page 59 that "the documents referred to were marked for identification Defendants' Exhibits 6 and 7". The Supreme Court of North Carolina having gone outside the printed record to find the true fact that the Federal Court records were identified, appellants believe that it is proper for them to include this material in the statement of the case, showing how the Federal records were identified, in order to show the further true fact, which does appear in the record that the Trial Court refused to admit said Exhibits 6 and 7 into evidence.

Motion to Set Aside the Verdict

Appellants filed in the case in the Superior Court a written motion to set aside the verdict and for judgment notwithstanding the verdict. The State did not answer the allegations of this motion. The allegations of the motion to quash were repeated by reference and in addition the following allegations were included in the motion to set aside the verdict (said motion appearing on Pages 91 to 97 of the printed Record below):

> II. That the Supremacy Clause (Article VI) of the Constitution of the United States requires this Court to give effect to and to enforce the judgments of the United States Courts covering the subject matter of this prosecution, particularly the "Decree and Injunction" of the United States District Court for the Middle District of North Carolina, in Civil Case No. 1058, in which these defendants were plaintiffs and Gillespie Park Golf Club, Inc., was one of the defendants, covering the identical acts and conduct charged by the State to be a crime of trespass in this case, said "Decree and Injunction" reading in part as follows:
>
> "It is now ordered, adjudged and decreed that defendants have unlawfully denied the plaintiffs as residents of the City of Greensboro, North Carolina, the privileges of using the Gillespie Park Golf Course, and

that this was done solely because of the race and color of the plaintiffs, and constitutes a denial of their constitutional rights, and unless restrained will continue to deny plaintiffs and others similarly situated."

That the State of North Carolina and its Jury in this case undertake to find to be criminal the identical acts and conduct which said "Decree and Injunction" holds to be protected by the Constitution of the United States, and further undertake to find to have been lawfully done, that which said "Decree and Injunction" holds was "unlawfully done," and that to permit said verdict to stand and to punish these defendants on the basis of said verdict would nullify and render ineffectual the rights of these defendants which said "decree and injunction" holds to be guaranteed and protected by the Constitution and laws of the United States, including the due process and equal proctection clauses of the 14th Amendment.

III. That a written opinion was handed down in the said case in the United States District Court for the Middle District of North Carolina by United States District Judge Johnson J. Hayes, which opinion is reported in 149 Fed. Supp. 562, and in which Judge Hayes said of the identical acts and conduct which the verdict finds to be criminal in this case, the following:

"This golf club permits white people to play without being members, or otherwise, except it requires the payment of greens fees. The plaintiffs here paid their fees, were forced off the course by being arrested for trespass. Everybody knows this was done because the plaintiffs were Negroes and for no other reason. This Court cannot ignore it."

Defendants respectfully request this Court to take judicial notice of this matter of common knowledge pertaining to this public golf course owned and operated by their agency by the City of Greensboro and the Greensboro City Board of Education. That this matter of common knowledge about the Gillespie Park Golf

Course was spoken truly and not idly by Judge Hayes when he wrote that "everybody knows" it was shown by Jurors in this case in their answers to questions touching their qualifications. Those who had played on Gillespie Park Golf Course stated very frankly and freely in open court that they had played on this course without any requirements except the payment of greens fees. Defendants respectfully suggest that, if any confirmation of Judge Hayes' statement that this was common knowledge which "everybody knows" is necessary it is found in these statements of the Jurors in this case.

Defendants respectfully suggest to the Court that to permit this verdict to stand under these circumstances would violate the rights of these defendants under the Constitution and laws of the United States, including the due process and equal protection clauses of the 14th Amendment.

IV. That said "Decree and Injunction" of the United States District Court for the Middle District of North Carolina begins as follows:

"This cause coming on for hearing and the Court having heard the evidence and argument of counsel and carefully considered the same and the briefs filed, and having made the findings of fact and conclusions of law which appear of record."

Defendants respectfully suggest to the Court that this reference in said "Decree and Injunction" to the findings of fact and conclusions of law which appear of record makes them a part of the "Decree and Injunction" just as if written out therein in full; and for this reason and also because said findings of fact and conclusions of law are a part of the record and judgment roll in said case in the United States District Court for the Middle District of North Carolina covering the identical acts and conduct which said verdict seeks to make a crime, the Supremacy Clause of the Constitution of the United States lays a duty upon this Court to respect and give effect to said findings of

fact and conclusions of law, and especially to Finding of Fact 33, which reads as follows:

"White citizens of Greensboro are given the privilege of becoming permanent members by p a y i n g $60.00 per year without greens fees and others not permanent members by paying $1.00 per year and greens fees of $.75, except on holidays and weekends, when it is more. On days other than holidays and weekends when greens fees are $1.25 white citizens are permitted to play without being members by paying the fees above set forth and without paying the extra $1.00 and without any questions being put to them. When the plaintiffs applied to be given the same privilege they were refused on the ground that they were not members but primarily because of their color. Plaintiffs laid the greens fees on the table in the club house, went out to play and after they had gotten to the 3rd hole the 'pro' in charge of the golf course ordered them off and they insisted they had a right to play and would not get off unless they were arrested by an officer, whereupon the 'pro' had them arrested and they were tried and convicted and sentenced to imprisonment for a period of 30 days, which is the maximum under the law for the State of North Carolina for trespassing."

Defendants further respectfully show to the Court that on these facts Judge Hayes said in his opinion the following:

"Citizenship in the United States imposes uniform burdens, such as paying taxes and bearing arms for the preservation and operation of our government. In like manner, whatever advantages or privileges one citizen in the United States may enjoy through his liberty becomes the constitutional right of each citizen and without regard to race, color or creed. These principles of law have been fully and elaborately established in the Fourth Circuit Court of Appeals and by the Supreme Court of the United States and must be adhered to in this case."

Defendants respectfully suggest to the Court that the verdict in this case not only does not adhere to these principles, but if permitted to stand would seek to thwart and nullify these principles, and that said verdict should be set aside to permit said principles to be adhered to and vindicated.

V. That the evidence in this case and the instructions of the Court to the Jury show that the land on which Gillespie Park Golf Course is situated is public and not private property, whereas G S 14-134, which is the North Carolina statute under which the warrants were drawn in this case, is meant to cover private property and not public property. Said statute reads:

"If any person after being forbidden to do so shall go or enter upon the lands of another without a license therefor, he shall be guilty of a misdemeanor, . . . "

Defendants respectfully suggest to the Court that this statute was never intended to apply to public lands or public property, but was and is intended to apply solely and only to private property, and that the lands and property and the possession alleged to have been invaded in this case was public lands and property and the possession of an agency of the City of Greensboro and the Greensboro City Board of Education, which held the title to said lands and property. In this connection defendants respectfully call the Court's attention to Finding of Fact No. 30 in said case in the United States District Court for the Middle District of North Carolina.

"That the leases in this case undertook to turn over to a corporation having no assets or income highly valuable income-producing property belonging to the City and the school board, the chief officer and promoter of said corporation being an official of the city, and the city having no prospect of getting anything from said leases except out of the income which the leased property was already bringing in, and with the

City reserving the right to put into the property further investments from other sources than said income and that under these circumstances said corporation was in fact an agency of the City and the school board for the continued maintenance and operation of the golf course for the convenience of the citizens of Greensboro."

The Superior Court denied the motion to set aside the verdict without requiring the State to answer its allegations. Appellants excepted and assigned the denial of the motion as error on appeal. (Page 97 of printed Record below.) The Supreme Court of North Carolina discusses this motion at length in its Opinion in this case and concludes: "Defendants were not, as a matter of right, entitled to have the verdict set aside." (Appendix "A" herto attached, starting at Page 50.) In its discussion of the motion to set aside the verdict the Supreme Court of North Carolina said with reference to the acts of playing golf in this case as having been before the Federal Courts: "It would appear from the opinion that **the entry involved in this case** was one incident on which plaintiffs there relied to support their assertion of unlawful discrimination, but it is manifest from the opinion that that was not all of the evidence which Judge Hayes had." (Emphasis added.)

Equal Protection Question Besides Racial Exclusion

In their motion to set aside the verdict appellants said (Page 93 of printed Record below): "Defendants respectfully suggest to the Court that to permit this verdict to stand under these circumstances would violate the rights of these defendants under the Constitution and laws of the United States, including the due process and equal protection clauses of the 14th Amendment."

Clyde Bass, assistant pro at the golf course when appellants sought to play, testified as to what he told appellants (Page 40 of printed Record below): "I told them it was a private club for members and invited guests only." He also testified (Page 41 of printed Record below): "To my knowledge, no Negroes have ever played at Gillespie Park Golf Course

before this date. Some Negroes have presented themselves before this date to play, but none have played to my knowledge."

Appellants alleged in their motion to set aside the verdict, and the State did not answer to deny the allegations, that the Jurors in this case, "in their answers to questions touching their qualifications," in the cases of those who had played on Gillespie Park Golf Course, "stated very frankly and freely in open court that they had played on this course without any requirements except the payment of greens fees."

The by-laws of the golf corporation said the following of membership in the corporation (Page 70 of printed Record below): "Membership in this corporation is restricted to members who are approved by the Board of Directors for membership in this Club."

Said by-laws said the following as to who was eligible to play on this golf course (Page 70 of printed Record below): "The golf course and its facilities shall be used only by members, their invited guests, members in good standing of other golf clubs, members of the Carolina Golf Association, pupils of the Professional and his invited guests."

John R. Hughes, president of the golf corporation, testified (Pages 74, 75 of the printed Record below): "We operated completely on our own. The City had nothing to do with it." "Those persons allowed to play were members of Gillespie Park Golf Club, Inc., and their invited guests and members in good standing with other clubs that were members of the Carolina Golf Asspciation."

One or more of appellants were members of a golf club which was not a member of the Carolina Golf Association. (Page 50 of printed Record below).

The Superior Court denied the motion to set aside the verdict and appellants took exception. (Page 97 of printed Record below). The Supreme Court of North Carolina affirmed and found no error. (Appendix "A" attached hereto, Page 53.)

Judicial Notice of 14th Amendment as Construed by Federal Decisions

Appellants contended in their motions to quash and to set aside the verdict and by proper assignments on appeal that it was the duty of the State Courts under the Supremacy Clause (Art. 6, Cl. 2) of the Constitution of the United States to notice and to enforce the Federal Court decisions declaring the rights of appellants with respect to the identical acts charged to be a criminal trespass in this case. (Pages 28, 91 of printed Record below). Appellants also alleged verbatim in the motion to set aside the verdict the Declaratory Judgment of the United States District Court covering said identical acts. (Page 92 of printed Record below).

The Supreme Court of North Carolina held that the State Courts would take judicial notice of the Federal Court's published Opinion, but that "Since the court was not required to take judicial notice of the judgment" in the Federal Court, "we are not called upon to determine the effect which should have been given if offered in evidence." (Appendix "A" attached hereto, Page 52.)

Raising Question of Double Jeopardy

In their motions to quash and to set aside the verdict appellants alleged that they had been subjected to double jeopardy in violation of the 14th Amendment to the Constitution of the United States. The motions were overruled and the Supreme Court of North Carolina said in its Opinion: "It is manifest that there is here no double jeopardy." (Appendix "A" attached hereto, Page 44.)

The successive criminal proceedings covering the identical acts charged to violate Section 14-134 of the General Statutes of North Carolina (1953) are set forth above under this Statement of the Case on Pages 8-10.

In the belief that this Court will take judicial notice of the proceedings in the Federal Court to aid in determining whether or not this Court has jurisdiction in this case, appellants have attached hereto as Appendix "E", Appendix "F", and Appendix "G", the Findings of Fact, the Conclu-

sions of Law; and the Decree and Injunction of the United States District Court for the Middle District of North Carolina.

(e) SUBSTANTIALTY OF THE FEDERAL QUESTIONS

This is the first time since the desegregation decisions of this Court that any state, so far as known to appellants, has undertaken to make a crime out of the exercise of "constitutional rights" which have been duly declared to exist by the Federal Courts. Months before the warrants were drawn in this case, charging to be a criminal trespass the acts of appellants in playing golf on the Municipal Gillespie Park Golf Course, the United States District Court for the Middle District of North Carolina had issued its Declaratory Judgment declaring that those identical acts of playing golf constituted the "constitutional rights" of appellants and further declaring that interference with those "constitutional rights" by the prosecuting witnesses in this case was "unlawfully" done; and also before said warrants were drawn said Declaratory Judgment had been duly affirmed by the Court of Appeals for the Fourth Circuit and had become final. The State agencies, namely, City of Greensboro, Greensboro City Board of Education, and Gillespie Park Golf Club, Inc., were the defendants against whom said Declaratory Judgment was issued, the Federal District Court having found in Finding of Fact No. 30, quoted verbatim by appellants in their motion to set aside the verdict and not denied by the State, that the said golf "corporation was in fact an agency of the City and the school board for the continued maintenance and operation of the golf course for the convenience of the citizens of Greensboro." (See Page 25 above.)

The State in this case seeks to reverse what the Federal Court has declared under the Constitution of the United States to be the "constitutional rights" of appellants, and to make unlawful under state law what the Federal Courts have held to be lawful under the Federal Constitution.

Cases on All-Fours on Question of Jurisdiction

On the question of jurisdiction, appellants believe that Marsh v Alabama, supra, is as near a case like the instant case as it is ordinarily possible for two cases to be.

In Marsh the defendants were arrested, tried and convicted for an alleged trespass under Sec. 426, Title 14, Alabama Code 1940, which statute is entitled "Trespass after warning," and which is in substance practically identical with Sec. 14-134 of the General Statutes of North Carolina (1953) as construed in the instant case.

The land involved in Marsh was a company-owned town, and the alleged trespass was remaining on a street in that town and distributing literature after being ordered to leave. Defendant having claimed rights under the First and Fourteenth Amendments of the Constitution of the United States, this Court entertained an appeal from the Supreme Court of Alabama, which sustained the conviction and sentence of defendant.

In this case the golf course involved was owned by the City of Greensboro and the Greensboro City Board of Education, but was operated by Gillespie Park Golf Club, Inc., a North Carolina corporation which the Federal Courts determined to be "an agency of the City and the school board." (See Page 25 above.) Appellants were arrested, tried and convicted under said North Carolina trespass statute for playing golf on this golf course, where they claimed they had a Federal constitutional right to be, this right having been established by Declaratory Judgment of the Federal Courts at the time the warrants in this case were drawn. (See Pages 10-12 and 20 above.)

The Supreme Court of North Carolina having sustained the judgment of conviction and sentence of appellants, it would seem that the jurisdiction of this Court on appeal would be clearly established by Marsh v Alabama. In that case, Mr. Justice Black said this for the Court:

> "In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the

enforcement of such restraint by the application of a state statute." (326 US at Page 509)

Mr. Justice Frankfurter concurring said:

"And similarly the technical distinctions on which a finding of 'trespass' so often depends are too tenuous to control decision regarding the scope of vital liberties guaranteed by the Constitution." (326 US at Page 511)

In the same vein of the principles of Marsh v Alabama, so far as the question of jurisdiction is concerned, is the case of Niemotko v Maryland, supra, which involved use of a state park without a permit, and the arrest, trial, conviction and sentence of defendants for such use under a Maryland disorderly conduct statute. From a final judgment sustaining the conviction and sentence, this Court entertained an appeal from the highest Maryland court.

Effect of Supremacy Clause on Section 14-134

In Railway Employees' Department etc. v Hanson, supra, this Court said: "A union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the federal law upon it and by force of the Supremacy Clause of Article VI of the Constitution, could not be made illegal nor vitiated by any provisions of the laws of a state."

Likewise, appellants contend that, at the time the warrants issued upon which appellants were arrested and tried and sentenced in this case, the identical acts of playing golf on the Municipal Gillespie Park Golf Course, which the State charges to be a crime, bore "the imprimatur" of the 14th Amendment as interpreted by the Federal Courts, and therefore "could not be made illegal" by Section 14-134 of the General Statutes of North Carolina, and that said statute must give way as unconstitutional, as it thus collides with the Federal Constitution.

Other cases sustaining the jurisdiction of this Court, where state law collides with Federal law, are: Franklin National Bank v New York and Public Utilities Commission of California v United States, both supra.

Judicial Notice.—Appellants take the view that Federal Court proceedings and judgments construing the Constitution and laws of the United States are not just ordinary judgments, but that they become an integral part of the Federal Constitution and laws which they construe. Appellants believe that when the Supremacy Clause says that "the Judges in every State shall be bound" by the Constitution and laws of the United States, it means to include the interpretation placed upon them by the Federal Courts.

In Smith v O'Grady, Warden, supra, this Court said of the Federal Constitution: "That Constitution is the supreme law of the land, and 'upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution.'" The State Court in this case could not know its duty without looking at all parts of the Federal decisions which appellants called to their attention as establishing "constitutional rights" in appellants to perform the acts of golf playing which the State charges to be a crime in this case.

In Lilly v Grand Trunk Western Ry Co, supra, the Supreme Court of Illinois declined to take judicial notice of a rule of the Interstate Commerce Commission under an Act of Congress. This Court reversed, saying: "Adopted in the exercise of the Commission's authority, Rule 153 acquires the force of law and becomes an integral part of the Act . . . , to be judicially noticed."

Likewise, in this case appellants believe that the decisions of the Federal Courts declaring to be the "constitutional rights" of appellants the identical acts of playing golf which the State charges to be a crime, became an integral part of the 14th Amendment in this case, "to be judicially noticed."

In Brown v Board of Education, supra, this Court said:

"This Court takes judicial notice of a fourth case, which is pending in the United States Court of Appeals for the District of Columbia Circuit, Bolling et al. v. Sharpe et al., No. 11,018 on that court's docket. In that case, the appellants challenge the appellees' refusal to admit certain Negro appellants to a segregated white school in the District of Colum-

bia; they allege that appellees have taken such action pursuant to certain Acts of Congress; they allege that such action is a violation of the Fifth Amendment of the Constitution."

Appellants believe that the principles upon which this Court took judicial notice even of allegations in the pleadings in said Brown case would, when supplemented by the Supremancy Clause of the Constitution of the United States, require the State Courts in this case not only to take judicial notice of but also to give effect to the proceedings and decisions of the Federal Courts, determining Federal "constitutional rights" and involving the identical acts of playing golf on the public Municipal Gillespie Park Golf Course which are involved in this criminal trespass prosecution; and that all of these matters raise most substantial Federal questions which give this Court jurisdiction to entertain this appeal, and which only this Court can finally resolve.

Little Rock Case (Aaron v Cooper, ____US____, Decided September 29, 1958). In this latest decision of this Court touching the reach of the judgments and decisions of the Federal Courts when intepreting or establishing "constitutional rights" under the Constitution of the United States, it was stated by Mr. Chief Justice Warren for a unanimous Court:

"Article VI of the Constitution makes the Constitution the 'supreme law of the land.' In 1803, Chief Justice Marshall, speaking for a unanimous court, referring to the Constitution as 'the fundamental and paramount law of the nation,' declared in the notable case of Marbury v. Madison, 1 Cranch 137, 177, that 'it is emphatically the province and duty of the judicial department to say what the law is.' This decision declared the basic principle that the Federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this court and the country as a permanent and indispensable feature of our constitutional system."

"Chief Justice Marshall spoke for a unanimous court in saying that: 'If the Legislatures of the several states may, at will, annul **the judgments of the courts of the United States, and destroy the rights acquired under those judgments,** the Constitution itself becomes a solemn mockery . . .' United States v. Peters, 5 Cranch 115, 136." (Emphasis Added.)

Pleadings Which Assert Federal Rights

Appellants state above verbatim (Pages 17-19, 20-25) allegations in their motions to quash and to set aside the verdict, asserting the Federal rights which they claim have been denied or infringed in this case. Since the State did not in any way deny these allegations, they must be accepted as true. Tomkins v Missouri, supra.

As to the jurisdiction and province of this Court on appeal from a state court where Federal constitutional rights have been set forth in a pleading, this Court said in Staub v City of Baxley, supra:

> "At the threshold, appellee urges that this appeal be dismissed because, it argues, the decision of the Court of Appeals was based upon state procedural grounds and thus rests upon an adequate nonfederal basis, and that we are therefore without jurisdiction to entertain it. Hence, the question is whether that basis was an adequate one in the circumstances of this case. 'Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of federal law; and where a case coming from a state court presents that question, this Court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court.' First Nat. Bank v Anderson 269 US 341, 346, 70 L ed 295, 302, 46 S Ct 135, and cases cited. See also Schuylkill Trust Co. v Pennsylvania, 296 US 113, 122, 123, 80 L ed 91, 98, 56 S Ct 31, and Lovell v Griffin, 303 US 444, 450, 82 L ed 949, 952, 58 S Ct 666. As Mr. Justice Holmes said in Davis v Wechsler, 263 US 22, 24, 68 L ed 143, 145, 44 S Ct 13, 'Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.' Whether the constitutional rights asserted by the appellant were '. . . given due recognition by the [Court of Appeals] is a question as

to which the [appellant is] entitled to invoke our judgment, and this [she has] done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support . . . [for] if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided.' Ward v Love County, 253 US 17, 22, 64 L ed 751, 758, 40 S Ct 419, and cases cited."

Jurisdiction as Affected by Discrimination Against Federal Rights

The Supreme Court of North Carolina held in its opinion in this case that the Federal Court proceedings establishing the "constitutional rights" of appellants could not be shown on a motion to quash. (Appendix "A" attached hereto, Page 45). But on May 7, 1958, in State v Perry, supra, the Supreme Court of North Carolina held that the Federal right not to be indicted by an unconstitutional grand jury could be shown on a motion to quash.

The reason for not forcing a defendant to stand trial until his claim that there is a fundamental impediment in the proceedings has been decided seems to be equally present in this case as in State v Perry.

Inadvertent Passing by of Federal Rights

Appellants have set out above at Pages 19-20, what they consider to be a fair statement concerning the record with regard to the assertion in the opinion of the Supreme Court of North Carolina: "Although the defendants had the record in that case identified, they did not offer it in evidence," meaning the record from the Federal Courts.

Appellants make no claim that this arose through other than inadvertence on the part of all concerned, including appellants. Since no petition for rehearing is permitted in a criminal case in the Supreme Court of North Carolina, appellants could not call this inadvertence to the attention of that

Court. But the effect upon the asserted Federal rights is the same as though this incorrect statement of fact about not offering the Federal Court records in evidence had been other than inadvertent.

Besides, under its decisions the Supreme Court of North Carolina has wide discretion to make inquiry of the Clerks of the lower State Courts to determine what actually transpired, where there are discrepancies in considering the record on appeal from such lower Courts. See Mason v Commissioners of Moore and Aycock v Richardson, both supra, and also Art. IV, Sec. 8 of the Constitution of North Carolina.

What is more, this wide discretion has actually been exercised by the Supreme Court of North Carolina, in reconciling discrepancies or ambiguities in the record in this case. See State's Motion to Dismiss at Page 173 of Transcript of the Record, and Opinion of the Court, Appendix "A", attached hereto, Page 42.

Appellants therefore contend that this brings the case on this point affecting the jurisdiction of this Court within the principle of NAACP v Alabama, supra, where this Court said: "Respondent recognizes that our jurisdiction is not defeated if the nonfederal ground relied on by the state court is 'without any fair or substantial support,' Ward v Love County, 253 US 17, 22, 64 L ed 751, 758, 40 S Ct 419."

Due Process and Equal Protection Question Aside from that of Racial Exclusion

At Pages 25-26 above appellants give a summary of the evidence as to how this Municipal Gillespie Park Golf Course was operated in permitting or excluding citizens from play. It shows clearly that these State agencies undertook to operate this public golf course, built originally with the Federal Government providing 65 per cent of the cost, as a private, membership only facility, and that the use was restricted to those citizens who met the approval of the Board of Directors and managers, without any known standards which all citizens could meet.

Appellants contend that this was a denial of equal protection and due process, without regard to racial exclusion. A

case on this principle is that of Niemotko v Maryland, supra, where citizens were tried and convicted for using a public park without a permit from those in charge. There this Court said:

> "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded."

Examining the evidence in Niemotko, this Court said:

> "In the instant case we are met with no ordinance or statute regulating or prohibiting the use of the park; all that is here, is an amorphous 'practice', whereby all authority to grant permits for the use of the park is in the Park Commissioner and the City Council. No standards appear anywhere; no narrowly drawn limitations; no circumscribing of this absolute power; no substantial interest of the community to be served."

And finally on Page 273 of 340 US:

> "It thus becomes apparent that the lack of standards in the license-issuing 'practice' renders that 'practice' a prior restraint in contravention of the Fourteenth Amendment and that the completely arbitrary and discriminatory refusal to grant the permits was a denial of equal protection. Inasmuch as the basis of the convictions was the lack of the permits, and that lack was, in turn, due to the unconstitutional defects discussed, the convictions must fall."

The president of the golf club testified: "The City had no voice in the operation of the golf course after the corporation took it up." "We operated completely on our own." (Page 26 above). The written by-laws of the golf corporation permitted members of "other golf clubs" to play, but this in practice was arbitrarily limited to clubs which were also members of the Carolina Golf Association, and appellants who were members of the City-owned 9-hole Nocho Park Golf Club were excluded from playing because their Club did not belong to Carolina Golf Association.

Changing Meaning of Statute Without Notice

Prior to the instant case, it had always been the interpretation of the Supreme Court of North Carolina that Section 14-134 of the General Statutes of North Carolina (the criminal trespass statute) applied only to private and not to public property. In State v Clyburn, supra, the Supreme Court of North Carolina said: "Our statutes, GS 14-126 and -134, impose criminal penalties for interfering with the possession or right of possession of real estate **privately** held." (Emphasis added.)

The instant case is the first case, so far as appellants have been able to discover, where the Supreme Court of North Carolina has ever held that said Section 14-134 imposes criminal penalties upon a citizen for going upon lands publicly owned and publicly held.

The decision of the Supreme Court of North Carolina in this case, therefore, raises serious questions of Due Process and Equal Protection under the Fourteenth Amendment, which are closely akin in principle to the question decided by this Court in Lambert v California, supra: "Engrained in our concept of Due Process is the requirement of notice."

It would seem that citizens would be entitled to some notice that the Supreme Court of North Carolina was going to change its well-settled rule that this criminal trespass statute applied only to "real estate privately held," before citizens using public lands could be expected to understand that, in exercising their "constitutional rights" to go upon such public lands, they would be running the risk of prosecution under this criminal trespass statute which had never before this instant case been applied to public lands.

Evidence Shows Racial Discrimination

The fact that no Negro has ever been permitted to play on this Municipal Gillespie Park Golf Course (See Pages 25-26 above), since the United States Government provided 65 per cent of the original cost in 1940, brings this case, in the opinion of appellants, within the principle of Eubanks v Louisiana, supra, where this Court said: "We are reluc-

tantly forced to conclude that the uniform and long-continued exclusion of Negroes from grand juries shown by this record cannot be attributed to chance, to accident, or to the fact that no sufficiently qualified Negroes have ever been included in the lists submitted to the various local judges."

Clyde Bass, "an agency of the City and the school board," (See Page 25 above), testified (See Pages 25-26 above): "To my knowledge no Negroes have ever played at the Gillespie Park Golf Course before this date. Some Negroes have presented themselves before this date to play, but none have played to my knowledge."

This Court in Eubanks found jurisdiction to reexamine the evidence to determine whether or not there had been racial exclusion.

Has there been Double Jeopardy?

This Court has not set the final boundaries under the 14th Amendment for successive criminal proceedings which a State may pursue, involving the same acts charged to be the same offense. In Hoag v New Jersey, supra, some prohibited limits were indicated to be harrassment and attempts "to wear the accused out by a multitude of cases with accumulated trials." This Court said: "The question in any given case is whether such a course has led to fundamental unfairness." Appellants believe that such unfairness is shown in this case.

Appellants were tried upon one set of warrants in Municipal-County Court. Without any final disposition having been made of this set of warrants, the State compelled appellants to defend a set of indictments in Superior Court. When these indictments in Superior Court were called for trial, the State did not finally dispose of them, but instead took a nol pros with leave to proceed under them again at some future date. Immediately the State arrested appellants upon a second set of warrants in Municipal-County Court, and it is this set of warrants involved in this case. The indictments in Superior Court and the second set of warrants which are involved in this case were all issued after the State knew that the Federal

Courts had by Declaratory Judgment established as the "constitutional rights" of appellants the identical acts and conduct which the State seeks to establish as a crime in this case. The State's agencies were the defendants in the Declaratory Judgment action.

Appellants believe that the State has exceeded the permissible limits for successive criminal proceedings in this case. To say the least, these successive criminal proceedings have been sanctioned by the State "in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time," or in this case a third time. (See Concurring Opinion in Brock v North Carolina, supra.)

Sufficient Substantiality for Plenary Consideration

Appellants believe that the Federal questions presented are sufficiently substantial to require plenary consideration, with briefs on the merits and oral argument, for the following reasons:

1. That it is of great public importance whether or not a State may use its criminal statutes (and whether or not this has occurred in this case) to punish citizens for exercising Federal rights declared by the Federal Courts to be protected by the Constitution of the United States under the desegregation decisions of this Court. The fact that the State Courts in this case reached a diametrically opposite result from that reached by the Federal Courts, in considering the identical acts of playing golf on the public Municipal Gillespie Park Golf Course would seem to emphasize the importance of full consideration in this Court. The Federal Courts held that appellants were merely exercising their "constitutional rights" in playing on this golf course and that the prosecuting witnesses in the instant case had "unlawfully denied the plaintiffs as residents of the City of Greensboro, North Carolina, the privileges of using the Gillespie Park Golf Course," while the State Courts below have held that these identical acts of appellants constitute a crime under Section 14-134 of the General Statutes of North Carolina, which appellants contend is unconstitutional as construed and applied in this case.

2. What effect under the Supremacy Clause of the Federal Constitution State Courts must give to Declaratory Judgments of the Federal Courts, declaring "constitutional rights" under the desegregation decisions of this Court, presents a question in this case to which appellants believe this Court should give a definitive answer, including the question of whether or not State Courts must take judicial notice of such Declaratory Judgments in proceedings covering the identical acts with reference to which the "constitutional rights" were declared. So far as appellants have been able to discover, these questions have not been finally determined by this Court.

3. There is involved in this case State action in turning over to a corporation created by the State, a public municipal golf course, to operate without any standards whatsoever set up by statute or ordinance, the public golf course involved having been built originally with the Federal Government providing 65 per cent of the cost and the Sponsors having agreed with the Government to operate the golf course for the benefit of the public during its useful life, and having agreed further not to lease or otherwise dispose of the golf course to any private interest during its useful life. This appeal presents questions as to whether or not, without regard to racial exclusion, the State may use its criminal sanctions to enforce whatever ad hoc rules and regulations such corporation and its officers and agents may establish to admit or exclude from the privileges of the golf course only those citizens whom the corporation and its officers and agents wished to admit or exclude.

4. Appellants believe that the other Federal questions presented in this Statement As To Jurisdiction, especially the questions as to discrimination against Federal rights and the question of double jeopardy, have not been sufficiently determined by the decisions of this Court to warrant their submission without plenary consideration.

Conclusion

Wherefore, appellants pray that this Court note probable jurisdiction in this case and grant plenary consideration, with briefs on the merits and oral argument, and in the alternative

that consideration of the question of jurisdiction be postponed until such a consideration on the merits. Appellants pray further that, if they should be mistaken in their belief that this Court has jurisdiction of this appeal under 28 USC 1257 (2), then that the appeal papers in that event be treated as a Petition for Certiorari under 28 USC 2103, and that the Petition be granted. See Sweezy v New Hampshire and Pennsylvania v Board of Directors etc., both supra.

Counsel of Record for Appellants:

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Other Counsel for Appellants:

Harold L. Kennedy
Annie Brown Kennedy
C. O. Pearson
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Note: The Printed (Mimeographed) Record Below constitutes Pages 1 to 107 of the Transcript of the Record on this appeal. Therefore, page references to the Printed (Mimeographed) Record Below likewise refer to the same pages of the Transcript of the Record on this appeal.

APPENDIX "A"

NORTH CAROLINA SUPREME COURT SPRING TERM 1958

STATE
v.
PHILLIP COOKE

STATE
v.
LEON WOLFE

STATE
v.
GEORGE SIMKINS, JR.

STATE
v.
JOSEPH STURDIVENT

STATE
v.
SAMUEL MURRAY

STATE
v.
ELIJAH H. HERRING

No. 582 — Guilford

Appeal by defendants from Fountain, S. J., February 3, 1958 Criminal Term of Guilford (Greensboro Division).

On 2 December 1957 a warrant issued from the Greensboro Municipal-County Court for Phillip Cooke, charging that on 7 December 1955 he "did unlawfully and willfully enter and trespass upon the premises of Gillespie Park Club, Inc., after having been forbidden to enter said premises."

Similar warrants were on the same day issued for each of the other defendants.

Defendants moved in the Municipal-County Court to quash the warrants. Their motions were overruled. They then entered pleas of not guilty. The court, after hearing the evidence, found each defendant guilty and imposed sentence. Defendants appealed to the Superior Court.

Attorney General Seawell and Assistant Attorney General Moody for the State.

Annie Brown Kennedy, Harold L. Kennedy, William A. Marsh, Jr., and C. O. Pearson for defendant appellants.

Rodman, J. The cases were, without objection, consolidated for trial in the Superior Court.

Before pleading to the merits in the Superior Court, defendants renewed their motions to quash as originally made in the Municipal-County Court. The motions made in apt time were overruled by the court.

Before considering the merits of the cases, we must ascertain if defendants were properly called upon to answer the criminal charges leveled against them. The motions to quash assign three reasons why defendants should not be called upon to answer the allegation that they violated the criminal laws of the State of North Carolina.

S. v. Cooke, 246 NC 518, 98 SE 2d 885, is relied upon for two of the three reasons assigned. An examination of that case is necessary to assay the merits of the motions. The crime with which defendants stand charged is a misdemeanor punishable by fine of $50 or imprisonment for thirty days, G.S. 14-134. The Municipal-County Court has jurisdiction of the offense charged. In December 1955 these defendants were charged in warrants issuing from that court with trespassing on the property of **Gillespie Park Golf Course.** They were convicted and appealed to the Superior Court. That court's jurisdiction of the cases then before it was derivative and not original. In the exercise of its derivative jurisdiction, it was confined to an inquiry as to the truth of the charges contained in the warrants issuing from the Municipal-County Court. It could not, in the exercise of that jurisdiction, try defendants for a different crime. Nevertheless, the warrants were amended in the Superior Court to charge defendants with a trespass on the property of **Gillespie Park Golf Club, Inc.** Defendants were convicted of the crime charged in the amended warrants. Defendants appealed their conviction to this court. We held that the amended warrant, by substi-

tuting another property owner, charged a different crime from the crime originally charged, and for that reasor the Superior Court could not, in the exercise of its derivative jurisdiction, try defendants on the new criminal charge.

Since the conviction by a court without jurisdiction to hear and determine the guilt or innocence of defendants was a nullity and the sentence imposed void, defendants could thereafter be tried when properly charged in a court having jurisdiction. S. v. Hicks, 233 NC 511, 64 SE 2d 871, cert. den. 342 US 381, 96 L ed 629. It is manifest there is here no double jeopardy. Green v. United States, 355 US _____, 2 L ed 199, on which defendants rely, has no application to the facts here presented. Double jeopardy is a valid defense when established by the facts. N. C. Constitution, Art. I, sec. 17; S. v. Mansfield, 207 NC 233, 176 SE 761. Where not disclosed by allegations of the bill or warrant, it is not a ground to quash.

In closing the opinion in the previous appeal, the writer, author of the opinion, said: "Defendants may, of course, now be tried under the original warrant since the court was without authority to allow the amendment changing the crime charged; or they may be tried on bills found in the Superior Court for the crime attempted to be charged by the amendment."

The last clause of that opinion is also relied on in the motion to quash. The statement, accurate as to most of the counties of the State, is inaccurate with respect to Guilford and the other counties enumerated in the proviso to G.S. 7-64. The Legislature, in the exercise of its discretion, has denied to the Superior Court sitting in the counties named in the proviso to G.S. 7-64 the right to exercise concurrent jurisdiction with inferior courts in the trial of misdemeanors. Because of the limitations so imposed on the jurisdiction of the Superior Court of Guilford County, it could not exercise original jurisdiction of the crime charged, namely, trespass after being forbidden, and if defendants were to be prosecuted for the trespass presently charged, the prosecution had to originate in a court inferior to the Superior Court. This is made clear in the concurring opinion of Justice Parker, who said: "It seems plain

that a verdict of conviction or acquittal on the warrants in this case as drawn would not be a bar to the new warrants in the form to which they were changed by the amendments."

The third and final reason assigned for quashing the warrants is the refusal of the court to take judicial notice of a judgment in a suit by defendants against the City of Greensboro, the Greensboro City Board of Education, and Gillespie Park Golf Club, Inc. (Simkins v. City of Greensboro, 149 F Supp. 562) which adjudged the plaintiffs in that suit had been denied the privilege of using the property involved in that litigation because of their color or race. A motion to quash is a proper method of testing the sufficiency of the warrant, information, or bill of indictment to charge a criminal offense. It is not a means of testing the guilt or innocence of the defendant with respect to a crime properly charged. "The court, in ruling on the motion, is not permitted to consider extraneous evidence. Therefore, when the defect must be established by evidence **aliunde** the record, the motion must be denied." S. v. Cochran, 230 NC 523, 53 SE 2d 663; Richardson v. State, 4 SW 2d 79; 27 Am Jur 695.

Since none of the reasons nor all combined sufficed to sustain the motion to quash, the court correctly overruled the motion and put defendants on trial for the offense with which they were charged.

To invade property in the possession of another is a crime under our laws. The severity of the punishment for such invasion is measured by the character of the entry. But the essential ingredient in the crime is possession by the person named in the warrant. If the possession is actual, the State need only establish that fact, but if the State fails to establish actual possession, it must establish a right to possession which by operation of law implies possession. S. v. Clyburn, 247 NC 455; S. v. Cooke, **supra;** S. v. Baker, 231 NC 136, 56 SE 2d 424.

Defendants do not controvert the fact that the corporation named in the warrant had physical possession of the property nor do they deny that over the protest of the agent of the corporation they took possession. The conduct depicted and

not denied would suffice to convict defendants of a forcible trespass. G.S. 14-126. It could easily have resulted in a serious breach of the peace. The State did not, however, charge them with that offense. It charged only the less grave offense of entry after being forbidden. As a defense to that charge, it is sufficient for defendants to establish that they entered under a **bona fide** belief of a right to so enter, which belief had a reasonable foundation in fact. S. v. Paggart, 170 NC 737, 87 SE 31; S. v. Wells, 142 NC 590; S. v. Fisher, 109 NC 817, but the burden is on the defendant to establish facts sufficient to excuse his wrongful conduct. S. v. Durham, 121 NC 546; S. v. Wells, **supra.** There was nothing in the State's evidence showing or tending to show any right on the part of defendants to enter after having been forbidden to do so. Hence the court correctly refused to allow defendants' motion for nonsuit.

Defendants offered in evidence a lease dated 19 April 1949 from the Board of Trustees of the Greensboro City Administrative Unit to Gillespie Park Golf Club, Inc. This lease recited that the property therein described had in 1947 been leased to the City of Greensboro so that the city might operate a golf course thereon, that Greensboro had agreed to cancel its rights under the lease, that lessor was of the opinion that it would not need the property for school purposes during the next ensuing five years and "since a nine-hole golf course has been laid out thereon, the Board of Trustees is of the opinion that it is advisable to lease the property to the Golf Club in order that its use as a golf course may be continued during the term of this lease, such use being, in the opinion of the Board of Trustees, a public or semipublic use." The lease was for a period of five years at a rental of $1000 per annum, but with a provision that lessor might cancel upon sixty days' notice if the property was needed for school purposes or if lessor desired to sell. An extension agreement was put in evidence extending lessee's term. The asserted trespass occurred during the extended term.

There is evidence that lessee had, during its term, expended more than $100,000 in enlarging the course from a nine-hole course to an eighteen-hole course, constructing a

club house, and making other improvements. Defendants offered in evidence by-laws adopted by lessee. The only two which may have any pertinency to this action are sections 1 and 2 of article 1. They provide: "SECTION 1 — Membership. Membership in this corporation shall be restricted to members who are approved by the Board of Directors for membership in this Club. There shall be two types of membership; one, the payment of a stipulated fee of $30.00 or more, plus tax, shall cover membership and greens fees. The other type of membership shall be $1.00, plus tax, but this type of member shall pay greens fees each time he uses the course. The greens fees and the amount of membership fees may be changed by the Board of Directors at any time upon two-thirds vote of the members of the Board. SECTION 2 — Use of Golf Facilities. The golf course and its facilities shall be used only by members, their invited guests, members in good standing of other golf clubs, members of the Carolina Golf Association, pupils of the Professional and his invited guests."

The City Administrative Unit, a governmental agency separate and distinct from the City of Greensboro, had no authority to operate recreational facilities which were not in some way related to the operation of the public school system. The Legislature created both County and City Administrative Units "for purposes of school administration." G.S. 115-4. The Administrative Unit, having acquired more land than was presently needed for school purposes, had legislative authority to lease the surplus. G.S. 115-126(5), Cline v. Hickory, 207 NC 125, 176 SE 250, 38 Am Jur 169. In the exercise of its discretion it could in good faith lease for a public or a private purpose. Prior to its lease to Gillespie Park Club, it had leased the property to the City of Greensboro. The City had apparently used it for recreational purposes and had erected a golf course thereon. When that lease terminated, the school authorities leased to a private corporation, but in their lease were careful to state that lessee was taking and would use it for public or semipublic purposes, namely, the operation of a golf course. Having expressly declared that the use which the lessee would make was a public or semipublic use, the law will presume the parties intended and contemplated that

the property should be used without unlawful discrimination because of race, color, religion, or other illegal classification. "It is an elementary rule of construction that parties will be presumed to have used language effectuating a lawful purpose rather than one which is unlawful." Beasley v. R.R., 145 NC 272; Newberry v. City of Andalusia, 57 So 2d 629. Since the operator of the golf club was charged with making a public or semipublic use of the property, it could not deny the use of the property to citizens simply because they were Negroes. This Court gave definite recognition to the principle of equality of treatment as between whites and Negroes nearly three-quarters of a century ago. Puitt v. Commissioners, 94 NC 709.

Dawson v. Mayor and City Council of Baltimore City, 220 F 2d 386; Lawrence v. Hancock, 76 F Supp. 1004; Tate v. Department of Conservation and Development, 133 F Supp 53; Culver v. City of Warren, 83 NE 2d 82, cited and relied upon by appellants are but applications of an established legal principle to the factual situations found to exist in each of those cases. This case in no wise questions the soundness of the legal principles there enunciated.

Since the decision in Brown v. Board of Education, 347 US 483, 98 L ed 873, 74 S Ct 686, separation of the races in the use of public property cannot be required. Judge Fountain expressly charged the jury that defendants could not be discriminated against because of color. He charged: "Now as to that question which arises upon the evidence, I instruct you then, ladies and gentlemen of the jury, that under the law as determined by the United States Court and as pronounced by them, the Gillespie Golf Club, Inc., by leasing the land from the City of Greensboro to use as a golf course was subjected to the same obligations as the City of Greensboro would have been had it operated a golf course itself. It was subjected to the same rights as the City would have had the same obligations and same responsibilities; that is to say, the law would not permit the City and, **therefore, would not permit its lessee, the Gillespie Park Golf Club, Inc., to discriminate against any citizen of Greensboro in the maintenance and operation and use of a golf course. It could not**

exclude either defendant because of his race or for any other reason applicable to them alone; that is to say, they were entitled to the same rights to use the golf course as any other citizen of Greensboro would be, provided they complied with the reasonable rules and regulations for the operation and maintenance and use of the golf course. They would not be required to comply with any unreasonable rules and regulations for the operation and maintenance and use of the golf course."

It will be observed that Judge Fountain, in his charge, treated the lease as though it were made by the City of Greensboro in the exercise of one of its corporate functions. In fact the lease was made by the school unit which had no duty or right to operate a golf course but which voluntarily provided for public use.

The court further charged: "If the corporation organized and known as the Gillespie Park Golf Club, Inc., if it maintained property and operated and used it for a golf course belonging to the City of Greensboro, and if the defendant was a resident of the City of Greensboro, then he had the same right to become a member of the golf club as any other resident of Greensboro, if he was a member of another golf club which had a reciprocal agreement with the Gillespie Park Golf Club to permit members on one course or members of one club playing on the other course, then such defendant and each of them had the same right or had the right to play upon the Gillespie Park Course. If the defendants, or either of them, were guests of some members of the Gillespie Park Golf Club, then they had a right to play upon that course.

"In other words, ladies and gentlemen of the jury, they had the same right under the laws as interpreted by the United States Courts to play on the golf course as any other citizen of the City of Greensboro provided they complied with the reasonable rules and regulations designed for the orderly maintenance and use of the golf course by the citizens of Greensboro."

He further charged, after stating defendants' contentions with respect to their right to play: "I instruct you, members of

the jury, if a party entering upon the land has a legal right to do so, of course he may not be convicted of a trespass."

Defendants moved to set aside the verdict of guilty. As the basis for their motion they rely on Simkins v. City of Greensboro, **supra**, decided by the United States District Court in March 1957. Although defendants had the record in that case identified, they did not offer it in evidence. It is not a part of the record presented to us. Our knowledge of the facts in that case is limited to what appears in the published opinion.

Examining the opinion, it appears that ten people, six of whom are defendants in this action, sought injunctive relief on the assertion that Negroes were discriminated against and were not permitted to play on what is probably the property involved in this case. We do not know what evidence plaintiffs produced in that action. It is, however, apparent from the opinion that much evidence was presented to Judge Hayes which was not before the Superior Court when defendants were tried. It would appear from the opinion that the entry involved in this case was one incident on which plaintiffs there relied to support their assertion of unlawful discrimination, but it is manifest from the opinion that that was not all of the evidence which Judge Hayes had. We are left in the dark as to other incidents happening prior or subsequent to the conduct here complained of, which might tend to support the assertion of unlawful discrimination. On the facts presented to him, Judge Hayes issued an order enjoining racial discrimination in the use of the golf course. Presumably that order has and is being complied with. No assertion is here made to the contrary.

To support their motion, defendants say in their brief: "That to allow the verdict to stand would amount to a collateral attack on the Federal decision." The mere assertion that a court of this State has not given due recognition to a judgment rendered by one of our Federal courts merits serious consideration.

The State challenges the assertion that there has been an attack, collateral or otherwise, on the judgment rendered by

the District Court. It maintains that the questions to be answered are these: (1) Should a court take judicial knowledge of facts found at another time by another court in another action; and if this question be answered in the affirmative, (2) is the State, in a criminal prosecution, concluded by facts found in a civil action to which it is not a party?

Since defendants for reasons best known to themselves elected not to offer in evidence the record in the Federal court case, it is apparent that the first question propounded must be answered. Unless we are to depart from previous adjudications by this Court and similar decisions by the Federal courts and the courts of sister States, the answer to that question must be no.

Speaking with respect to judicial notice, Chief Justice Marshall said: "The looseness which would be introduced into judicial proceedings would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the cause. Such a proceeding, in ordinary cases, would subvert the best established principles, and overturn those rules which have been settled by the wisdom of ages." U.S. v. Wilson, 7 Pet. 150, 8 L ed 640.

Mr. Justice Miller said: "While it is certainly true that the pendency of a suit in one court is not a defense, though it may sometimes be good in abatement, to another suit on the same cause of action in another court of concurrent jurisdiction, it may be considered as established that when a judgment is recovered against the defendant in one of those courts, if it is a full and complete judgment on the whole cause of action, it may be pleaded as a defense to the action in that court where it is pending and undecided. Neither court would be bound to take notice of the judgment in the other court judicially." Schuler v. Israel, 120 US 506, 30 L ed 707. To like effect see S. v. McMilliam, 243 NC 775, 92 SE 205; Reid v. Holden, 242 NC 408, 88 SE 2d 125; Hampton v. Pulp Co., 223 NC 535, 27 SE 2d 538; Daniel v. Bellamy, 91 NC 78; Bluthenthal v. Jones 208 US 64, 52 L ed 390; Williams-Perry v. Reeder, 17 NW 2d 98; Naffah v. City Deposit Bank, 13 A 2d 63; Belyeu v. Bowman, 41 So 2d 290;

James v. Unknown Trustees, Etc., 220 P 2d 831; Swak v. Department of Labor & Industries, 240 P 2d 560; Paridy v. Caterpillar Tractor Co., 48 F 2d 166; Morse v. Lewis, 54 F 2d 1027; Helms v. Holmes, 129 F 2d 263; Atlantic Fruit Co. v. Red Cross Line, 5 F 2d 218; Polzin v. National Co-op Refinery Ass'n., 266 P 2d 293; Divide Creek Irrig. Dist, v. Hollingsworth, 72 F 2d 859, 96 ALR 937, with annotations; White v. Central Dispensary & Emergency Hospital, 99 F 2d 355, 119 ALR 1002; Robinson v. Baltimore & O. R. Co., 222 US 506, 56 L ed 288; 31 CJS 627; 20 Am Jur 102.

Because the judgment in the case of Simkins v. Greensboro was not in evidence, the court had no knowledge in a legal sense of any facts there determined, and could make no pronouncement of law with respect to facts which were not in evidence. Judge Hayes' published opinion was available. That opinion is a declaration of the law on the facts which Judge Hayes found.

Since the court was not required to take judicial notice of the judgment in the civil action, we are not called upon to determine the effect which should have been given if offered in evidence.

When the doctrine of collateral estoppel should be applied is not always easily solved. In Van Schuyver v. State, 8 P 2d 688, it was held that a judgment in a civil action between prosecuting witness and defendant which determined the ownership of domestic fowl could not be used by the defendant in a criminal action to estop the State from prosecuting him on a charge of larceny. Similar conclusions have been reached in other jurisdictions with respect to the ownership of property. State v. Hogard, 12 Minn 293; People v. Leland, 25 NYS 943; Hill v. State, 3 SW 764 (Tex.)

It is said in the annotation to Mitchell v. State, 103 AM St Rep 17: "When the previous judgment arose in a case in which the state or commonwealth was the prosecutor or plaintiff and the defendant in the case at bar was also the defendant, and the judgment was with reference to a subject which is material to the case at bar, the doctrine of res judicata applies. (citations) But where the judgment to which it is sought

to apply the doctrine of res judicata was rendered in a civil proceeding to which the state was not a party, or in a criminal proceeding to which the defendant in the case at bar was not a party, the doctrine of res judicata does not apply. (citations)"

The Supreme Court of the United States has recognized and applied the law as there announced to differing factual situations. Compare U. S. v. Baltimore & O. R. Co., 229 US 244, 57 L ed 1169, and Williams v. N. C., 325 US 226, 89 L ed 1577. Other illustrations may be found in: S. v. Dula, 204 NC 535, 168 SE 836; Warren v. Ins. Co., 215 NC 402, 2 SE 2d 17; Powers v. Davenport, 101 NC 286; S. v. Boland, 41 NW 2d 727; People v. McKenna, 255 P 2d 452; S. v. Morrow, 75 P 2d 737; S. v. Cornwell, 91 A 2d 456; S. v. Greenberg, 109 A 2d 669. Extensive annotations appear as a note to Green v. State, 87 ALR 1251; 30A Am Jur 518. Defendants were not, as a matter of right, entitled to have the verdict set aside.

The exceptions to the admission and exclusion of evidence have been examined. We have found none which indicates prejudicial error or appears to warrant discussion.

We find

No error.

APPENDIX "B"

JUDGMENT — SUPREME COURT OF NORTH CAROLINA
SPRING TERM, 1958 NO. 582 GUILFORD COUNTY

STATE

vs.

Phillip Cooke, Leon Wolfe, George Simkins, Jr.,

Joseph Sturdivent, Samuel Murphy, Elijah H. Herring

This cause came on to be argued upon the transcript of the record from the Superior Court Guilford County: Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable William B. Rodman Justice, be certified to the said Superior Court, to the intent that the proceedings be had therein in said cause according to law as declared in said opinion. And it is considered and adjudged further, that the defendants and surety to the appeal bond, Southern Fidelity Mutual Insurance Company, do pay the costs of the appeal in this Court incurred, to wit, the sum of One Hundred and 20/100 dollars ($100.20), and execution issue therefor.

A TRUE COPY

Adrian Newton
Clerk of the Supreme Court.

APPENDIX "C"

STATE
vs.
PHILLIP COOKE

STATE
vs.
LEON WOLFE

STATE
vs.
GEORGE SIMKINS, JR.

STATE
vs.
JOSEPH STURDIVENT

STATE
vs.
SAMUEL MURRAY

STATE
vs.
ELIJAH H. HERRING

(Filed 28 June, 1957.)

Appeals by defendants from Burgwyn, E. J., December 1956 Criminal Term of Guilford (Greensboro Division).

On 7 December 1955 six warrants issued from the Greensboro Municipal-County Court on affidavit of Ernest Edwards charging the defendants therein named "did unlawfully and willfully trespass upon the property of Gillespie Park Golf Course, Greensboro, North Carolina, after having been forbidden to do so." The cases were heard in the Municipal-County Court on 6 February 1956. Each defendant was found guilty, and from the sentence imposed each appealed to the Superior Court. The cases were by consent consolidated for trial in the Superior Court.

Ernest Edwards, on whose affidavit the warrants issued, testified: "I'm employed as a golf professional manager of

the Gillespie Park Golf Club, Incorporated. The golf club is an 18-hole club with club house. It's located on Asheboro Street and Randolph Avenue on the new Super Highway . . . . Back on the 7th day of December, 1955, I was employed as manager of Gillespie Park Golf Course, Incorporated. At that time one of my functions was to operate the Gillespie Park Golf Course."

He was asked: "On that date, the 7th day of December, 1955, state whether or not the corporation was in possession of the Gillespie Park Golf Course. A. It was."

Witness testified that defendants, on the date named, over his protest, played golf on the course.

When the State rested, defendants moved for nonsuit. Before the motion was heard, the solicitor asked the court to reopen the case so that he might make a motion to amend the warrants. His request was granted; whereupon, over the objection of defendants, the warrants were amended to read: "Did unlawfully and willfully enter and trespass upon the premises of Gillespie Park Golf Club, Inc., after having been forbidden to enter said premises and not having a license to enter said premises against the statute in such cases made and provided and against the peace and dignity of the State."

After the warrants were amended, defendants offered a lease by the City of Greensboro to Gillespie Park Golf Course, Inc., dated 7 April 1949, for a term of one year, of the city's club house and golf course. Renewals of this lease were offered in evidence, the last renewal bearing date 2 April 1953 extending lessee's term to 6 April 1958.

The jury returned a verdict of guilty as to each defendant. Judgments were entered on the verdicts and defendants appealed.

Attorney-General Patton and Assistant Attorney-General Giles for the State.

J. Kenneth Lee, Major S. High, C. O. Pearson, and William A. Marsh, Jr., for defendant appellants.

RODMAN, J. The crime of which defendants stand convicted is the entrance without a bona fide claim of right on land in the possession of another after having been forbidden to so enter. The act is made a crime by statute, G.S. 14-134. The statute carries the heading "Trespass on land after being forbidden . . ."

". . . every unauthorized, and therefore unlawful, entry into the close of another, is a trespass." Dougherty v. Stepp, 18 N.C. 371; Armstrong v. Armstrong, 230 N.C. 201, 52 S.E. 2d 362; Lee v. Stewart, 218 N.C. 287, 10 S.E. 2d 804; Brame v. Clark, 148 N.C. 364.

By the common law an unauthorized entry on the lands of another was redressed by civil action, but where the entry was made by means of force or threats apt to disrupt the peace, the trespass was made a crime in England prior to Sir Walter Raleigh's ill-fated attempt to establish a colony on our shores. Such a disturbance of possession is a statutory crime under our laws. G.S. 14-126. To convict one of the crime of forcible trespass, it is essential for the State to establish an entry with such force as to be "apt to strike terror" to the prosecutor whose possession was disturbed. It is necessary to allege and establish actual possession in the prosecutor. S. v. Simpson, 12 N.C. 504; S. v. McCauless, 31 N.C. 375; S. v. Ray, 32 N.C. 39; S. v. Laney, 87 N.C. 535; S. v. Davenport, 156 N.C. 597, 72 S.E. 7. Whether the right to possession was a good defense at common law was left unsettled in S. v. Ross, 49 N.C. 315.

In 1866 the Legislature made it a crime to invade possession even though the forbidden entry was made without force or threats. Good faith in making the entry is a defense. S. v. Wells, 142 N.C. 590; S. v. Crosset, 81 N.C. 579; S. v. House, 71 N.C. 518; S. v. Hanks, 66 N.C. 612. But possession is an essential element of the crime. If the State fails to establish that prosecutor has possession (actual or constructive) no crime has been established. S. v. Baker, 231 N.C. 136, 56 S.E. 2d 424; S. v. Faggart, 170 N.C. 737, 86 S.E. 31; S. v. Yellowday, 152 N.C. 793, 67 S.E. 480; S. v. Whitehurst, 70 N.C. 85.

Where an interference with the possession of property is

a crime, it is necessary to allege in the warrant or bill of indictment the rightful owner or possessor of the property, and the proof must correspond with the charge. If the rightful possession is in one other than the person named in the warrant or bill, there is a fatal variance. Such has been the holding in forcible trespass, S. v. Sherrill, 81 N.C. 550; in trespass after being forbidden, S. v. Baker, supra, and in malicious injury to property, S. v. Hicks, 233 N.C. 31, 62 S.E. 2d 497; S. v. Mason, 35 N.C. 341; in larceny, S. v. Law, 227 N.C. 103, 40 S.E. 2d 699; S. v. Harris, 195 N.C. 306, 141 S.E. 883; S. v. Harbert, 185 N.C. 760, 118 S.E. 6. See also Adams v. State, 119 So. 189 (Miss.); Brown v. State, 85 S.E. 262 (Ga.); 87 C.J.S. 1113; 42 C.J.S. 1054; 27 Am. Jur 649.

On the appeal defendants could only be tried for the crime for which they were convicted in the Municipal-County Court, viz., disturbing the possession of Gillespie Park Golf Course. The Superior Court could try them for a different crime upon a bill found or waived. S. v. Mills, 242 N.C. 604, 89 S.E. 2d 141; S. v. Banks, 241 N.C. 572, 86 S.E. 2d 76; S. v. Hall, 240 N.C. 109, 81 S.E. 2d 189; S. v. Thomas, 236 N.C. 454, 73 S.E. 2d 283; S. v. Mills, ante, 237.

The Superior Court has broad power to allow amendments to warrants. This power to amend is the power to make accurate and sufficient the statement of the crime asserted or attempted to be asserted. The court has no power to permit a warrant to be amended so as to charge an entirely different crime from the one on which defendant was convicted in the lower court. S. v. McHone, 243 N.C. 231, 90 S.E. 2d 536; S. v. Clegg, 214 N.C. 675, 200 S.E. 371; S. v. Goff, 205 N.C. 545, 172 S.E. 407; S. v. Taylor, 118 N.C. 1262.

When the court permitted the warrants to be amended so as to charge a trespass on property of a person (Gillespie Park Golf Club, Inc.) other than property of the person named in the original warrant, it substituted one criminal charge for another criminal charge. This different crime could only be charged by bill found or waived. The defendants have not waived bills.

The record discloses the fatal variance. It is our duty to

note it. S. v. Scott, 237 N.C. 432, 75 S.E. 2d 154; S. v. Stonestreet, 243 N.C. 28, 89 S.E. 2d 734; S. v. Strickland, 243 N.C. 100, 89 S.E. 2d 781. Defendants may, of course, now be tried under the original warrant since the court was without authority to allow the amendment changing the crime charged; or they may be tried on bills found in the Superior Court for the crime attempted to be charged by the amendment. S. v. Strickland, supra; S. v. Hicks, 233 N.C. 511, 64 S.E. 2d 871; S. v. Sherrill, 82 N.C. 694.

The judgment is

Arrested.

Parker, J., concurring: In considering the amendments to the warrants the difficulty is in determining whether the amendments are as to a matter of form or go to the substance of the charge. I find in Annotations in 7 A.L.R., p 1526 et seq., and in 68 A.L.R., p. 930 et seq., the statement that "the allowance by the court of an amendment to an indictment as to the name of the person alleged therein to be the owner of the property which is the subject of the crime is generally authorized, as the correction of a defect in form." In support of the text, cases are cited from Iowa, Louisiana, Mississippi, New York, Pennsylvania, Vermont, Canada and England. An examination of a number of the cases cited discloses that the decisions were based on statutes of the various jurisdictions permitting in substance an amendment when a variance develops between the allegations in an indictment and the testimony as to the ownership of property.

Our statute G.S. 15-148—Manner of alleging joint ownership of property—does not permit the amendments allowed in the instant case. Nor do I know of any statute of ours that does so.

Warrants are, in most instances, drafted by laymen who are not learned in the technicalities of the law, and are not familiar with the necessity of stating in the warrant the correct name of the owner of property. The essence of the offense here is a trespass upon land after being forbidden. G.S. 14-134. The correct name of the lessee of the golf course was

not stated in the original warrants. A study of the Record and defendants' brief discloses that the amendment to the warrants so as to allege the correct name of the lessee of the golf course did not affect the defense, or take the defendants at a disadvantage in any respect, as shown by the fact that their brief does not contend the allowance of the amendments to the original warrants was error. Yet, because of the defect in the name of the lessee, and by reason of the fact that we have no statute to permit an amendment in such a case, the judgment is arrested. The time of the trial has been wasted, and if the State desires to proceed further, it must start anew with new warrants.

One test to determine whether the change made was material is whether a verdict of conviction or acquittal on the warrant as drawn would be a bar to a warrant in the form in which it stood after the amendment. Com. v. Snow, 269 Mass. 598, 169 N.E. 542, 68 A.L.R. 920. It seems plain that a verdict of conviction or acquittal on the warrants in this case as drawn would not be a bar to the new warrants in the form to which they were changed by the amendments. It follows from these considerations that the change made in the warrants was one of substance and not of form.

In my opinion, the General Assembly, in its wisdom, should consider the advisability of enacting a statute that warrants issued by Justices of the Peace, Municipal or County Criminal Courts, can be amended on or before the trial, when there shall appear to be any variance between the allegations in the warrant and the evidence in setting forth the ownership of property, if the court should be of opinion that the amendment will not prejudice the defendant in his defense. Various states have done so, as appears in the cases cited in the A.L.R. Annotations referred to above.

APPENDIX "D"

IN THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

Phillip Cooke, Leon Wolfe, George Simkins, Jr., Joseph Sturdivant, Samuel Murray, and Elijah H. Herring, Appellants

v.

State of North Carolina
No. 582 — Guilford

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Phillip Cooke, Leon Wolfe, George Simkins, Jr., Joseph Sturdivant, Samuel Murray, and Elijah H. Herring, the appellants above named, hereby appeal from the final order of the Supreme Court of North Carolina affirming and finding no error in the judgment of conviction and sentence of said appellants, which judgment and sentence were entered by the Superior Court of Guilford County, North Carolina, on February 10, 1958, and the opinion of the Supreme Court of North Carolina affirming and finding no error in said judgment of conviction and sentence having been filed in the office of the Clerk of the Supreme Court of North Carolina on June 4, 1958, and the final order pursuant to said opinion having been entered as of the same date as said opinion.

This appeal is taken pursuant to 28 USC Sec. 1257 (2).

Appellants have been tried twice upon two separate and successive sets of warrants in the Municipal-County Court of Greensboro, Guilford County, North Carolina, for the same acts of playing golf on the public municipal Gillespie Park Golf Course, the crime charged on each occasion being that of simple trespass under Section 14-134 of the General Statutes of North Carolina (1953). The first trial resulted in conviction and sentence to a fine of $15. On appeal and trial de novo in the Superior Court of Guilford County, North Carolina, there was a jury trial and verdict of guilty and a sentence

of 30 days in jail. On appeal to the Supreme Court of North Carolina the judgment of the Superior Court was arrested, not upon any ground set up by appellants, but because the Supreme Court found that the Superior Court lost jurisdiction and its actions were a nullity, when it permitted the warrants to be amended to change the name of the prosecuting witness from Gillespie Park Golf Course to Gillespie Park Golf Club, Inc. No further action was taken either by the Supreme Court or the Superior Court with reference to the original warrants and judgment and sentence in the Municipal-County Court.

Thereafter, on December 2, 1957, entirely new warrants charging appellants with the same offense were issued in the Municipal-County Court of Greensboro, Guilford County, North Carolina. The trial in Municipal-County Court resulted again in conviction and the sentence was 30 days in jail, to be suspended upon the payment by each appellant of a fine of $1. Upon a trial de novo upon appeal to the Superior Court of Guilford County, North Carolina, there was a jury verdict of guilty and the Court's judgment and sentence of 15 days in jail. On appeal the Supreme Court of North Carolina affirmed and found no error in the trial, judgment and sentence.

Appellants are presently enlarged upon bail in the sum of $200 each and a stay of execution by a Justice of the Supreme Court of North Carolina.

II. The Clerk of the Supreme Court of North Carolina will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. The Record in this cause as printed and filed for use of the Supreme Court of North Carolina upon appeal during the Spring Term of 1958, No. 582, coming from the Superior Court of Guilford County, North Carolina, and all other papers which were before said Supreme Court upon said appeal.

2. The Opinion of the Supreme Court of North Carolina which was filed in this cause on June 4, 1958.

3. The final order affirming and finding no error in the proceedings of the Superior Court of Guilford County, entered as of June 4, 1958.

4. Any and all orders staying execution in this cause.

5. This Notice of Appeal to the Supreme Court of the United States, with Proof of Service of same.

III. The following questions are presented by this appeal:

1. Is Section 14-134 of the General Statutes of North Carolina (1953), as construed and applied by the State Courts in this case, unconstitutional under the Constitution of the United States, including the Supremacy Clause (Art. 6, Cl. 2), and also including the Fourteenth Amendment as interpreted by the United States District Court for the Middle District of North Carolina in George Simkins et al. v. City of Greensboro et al., 149 Fed. Supp. 562, and by the Court of Appeals for the Fourth Circuit affirming in City of Greensboro et al. v. George Simkins et al. 246 Fed. 2d 425?

2. Could the State agencies in this case, namely, City of Greensboro, Greensboro City Board of Education, and Gillespie Park Golf Club, Inc., consistent with the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States, promulgate written regulations converting the public municipal Gillespie Park Golf Course, originally constructed with the Federal Government providing 65 per cent of the cost, into a private-club membership-only golf course, excluding all citizens who did not meet the membership rules? and do the membership rules as set out in the record thus limiting the use and enjoyment of this public municipal golf course, having been promulgated by State agencies, violate the Equal Protection Clause of the Fourteenth Amendment? and, said State agencies having adopted a written rule making eligible to play on said public municipal golf course "members in good standing of other golf clubs," could the State agencies operating the golf course, consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily in practice limit use and enjoyment of the golf course to those "members in good standing of other golf clubs"

whose golf clubs were members of the Carolina Golf Association?

3. Was it the duty of the State Courts in this case to accept as true the allegations asserting appellants' Federal rights in their motion to quash the warrants and in their motion to set aside the verdict and for judgment notwithstanding the verdict, in view of the fact that the State did not answer to deny or controvert any of said allegations?

4. In its opinion in this case the Supreme Court of North Carolina having said, with reference to the Federal case cited in Question No. 1 above, that "Our knowledge of the facts in that case is limited to what appears in the published opinion," and having also said that "It would appear from the opinion that the entry involved in this case was one incident on which plaintiffs there relied to support their assertion of unlawful discrimination," was it the duty of the State Courts in this case, under the Supremacy Clause (Art. 6, Cl. 2) of the Constitution of the United States, to consider and give effect to all of the facts set forth in said opinion of the Federal Court, and having taken judicial notice of said opinion, was it also the duty of the State Courts under the Supremacy Clause to take judicial notice of the Federal Court's Findings of Fact, Conclusions of Law, and Declaratory Judgment, in order to determine the extent to which the acts and conduct held by the State Courts to be a crime in this case were held by the Federal Courts to be protected by the Fourteenth Amendment to the Constitution of the United States?

5. The Supreme Court of North Carolina having held on May 7, 1958 in State v. Perry, 248 N.C. 334, that the unconstitutionality of a jury panel under the Constitution of the United States could be shown by evidence upon a motion to quash the indictment, was it a discrimination against the Federal rights asserted by appellants in this case for the State Courts to deny the request made by the appellants in their motion to quash the warrants and again in their motion to set aside the verdict, for an opportunity to present the record in the Federal case cited in Question No. 1 above upon the hearing of said motions?

6. Was it a discrimination against and an infringement upon the Federal rights asserted by appellants in this case for the State Courts to refuse to give effect to Finding of Fact No. 30 and Finding of Fact No. 33 in the Federal case cited in Question No. 1 above, both of which Findings of Fact were quoted verbatim in appellants' motion to set aside the verdict, and the State not having answered to deny or controvert the allegations of said motion in any way?

7. The Supreme Court of North Carolina having held consistently prior to this case that said Section 14-134 of the General Statutes of North Carolina did not apply to public lands but only to "the possession or right of possession of real estate privately held," (State v. Clyburn, 247 N.C. 455), was it a discrimination against the Federal rights asserted by appellants for the North Carolina Supreme Court to depart from this rule and hold that the statute did apply to the alleged trespass upon the public municipal golf course involved in this case?

8. The Supreme Court of North Carolina having approved in its opinion in this case the charge to the jury that "if a party entering upon the land has a legal right to do so, of course he may not be convicted of a trespass," and the Declaratory Judgment in the Federal case cited in Question No. 1 above having declared that the interference with and causing appellants to be arrested for playing on the golf course "was done solely because of the race and color of the" appellants "and constitutes a denial of their constitutional rights," (said Declaratory Judgment being quoted verbatim in appellants motion to set aside the verdict, and the State having not answered to deny or controvert said motion), was it a violation of the duty of the State Courts under the Supremacy Clause and of the rights of appellants under the Fourteenth Amendment of the Constitution of the United States for the Supreme Court of North Carolina to hold in this case that the State Courts were not concluded by the Federal Court's determination of the "constitutional rights" of the appellants, and to submit to the State's jury the determination of this Federal "legal right" of appellants under the Constitution of the United States to play on this public municipal golf course?

9. The Supreme Court of North Carolina having gone outside the record before it to find in its opinion in this case the true fact concerning the Federal case cited in Question No. 1 above that "defendants had the record in that case identified," did the Equal Protection Clause of the Fourteenth Amendment require the Court to note the further true fact that the records in said Federal case were in fact identified as "Defendants' Exhibits 6 and 7," in order that the Court might see the further true fact that said Exhibits 6 and 7 were in fact offered in evidence and their admission refused by the Trial Judge, as shown on Page 77 of the printed record before the Supreme Court of North Carolina?

10. Appellants having been tried twice upon two separate and different sets of warrants for the same alleged offense in the Municipal-County Court of Greensboro, Guilford County, North Carolina, and the first set of warrants and the conviction and sentence thereunder being still outstanding and undisposed of at the time of the issuance of the second set of warrants and the trial and conviction thereunder, does the second trial and conviction and sentence amount to the kind of double jeopardy which the 14th Amendment forbids as a denial of due process?

Dated this 27th day of August, 1958.

Harold L. Kennedy
C. O. Pearson

PROOF OF SERVICE

I, T. W. Bruton, Assistant Attorney General of the State of North Carolina, hereby acknowledge receipt of a copy of the foregoing Notice of Appeal to the Supreme Court of the United States, this the 27 day of August, 1958.

T. W. Bruton

APPENDIX "E"

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon due consideration of the evidence and argument of counsel the court makes the following findings of fact:

1. In 1927 the school board purchased approximately 70 acres of land in the southwestern part of the city for school purposes, this land being thereafter known as the Gillespie school property or land. This was more land than was immediately needed for school purposes, but the excess was held for future needs. In 1940 the City had an opportunity to secure from the Works Progress Administration 65% of the cost of constructing a nine-hole public golf course for the citizens of Greensboro. An arrangement was thereupon made between the City and the school board whereby the school board, sometime between August 20, 1940, and July 6, 1942, leased to the City a portion of the Gillespie School property in order that a public golf course might be constructed and operated thereon. The lease was made for a term of five years and thereafter from year to year, subject to the provision that it might be terminated by either party thereto upon ninety days written notice to the other, but that such right should not be exercised by the school board during the first five years unless the land was needed for school purposes. The rental was fixed at $1.00 a year, plus $40.00 a month for the dwelling house located on the land beginning when the house was made available for the City. The lease provided that the city should have full charge of the golf course and the operation thereof without interference on the part of the school board and that the city might make such charges for the use thereof as it might deem advisable.

(Note. This lease is the school board's Exhibit No. 1. It is not dated, and there is nothing to show when it was executed except by reference to the acknowledgments. It was acknowledged for the school board on August 20, 1940, and for the city on July 6, 1942. For that reason the lease is referred to as having been executed between August 20, 1940, and July 6, 1942. For findings suggested

in the above paragraph, see also paragraph 15(b) of the school board's answer and the stipulation relating thereto.)

2. The golf course was constructed and was operated under that lease by the city until April 1, 1947, when a new lease to the city was executed by the school board, the provisions of the lease being substantially as in the original lease, except that the rental was fixed at $1,000.00 a year, and the term of the lease was for one year and thereafter from year to year. On April 7, 1949, that lease was in effect and the then term would have expired April 1, 1950.

(See school board's Exhibit No. 2, also paragraph 15(b) of the school board's answer and the stipulations relating thereto.)

3. About this time the city constructed or assisted in the construction of an additional nine holes of the golf course upon a tract of land which was adjacent to the tract on which the original nine holes had been constructed.

(See amendment to paragraph 15(b) of the school board's answer and the stipulation relating thereto.)

4. On April 7, 1949, the city executed a lease whereby it leased to Gillespie Park Golf Course, Inc., the portion of the golf club owned by the City.

(See plaintiffs' exhibit No. ., lease dated April 7, 1949.)

5. On April 13, 1949, the City Council of the City of Greensboro adopted a resolution reciting that the city council was of the opinion that the best interest of the city would be served by the operation of the municipal golf course by a non-profit corporation instead of by the city and that the best interest of the city would be served by the leasing of that portion of the golf course owned by the school board to Gillespie Park Golf Club, Inc., and requesting the school board to join the city in the leasing of the whole of the golf course to the golf club.

(See the school board's Exhibit No. 3 and paragraph 15(b) of the school board's answer and the stipulation relating thereto.)

6. Pursuant to such request of the city council, the school board, under date of April 19, 1949, leased to the golf club that portion of the golf course owned by the school board for a term of five years, with the provision that the school board, if it needed the property for school purposes or if it desired to offer it for sale, might terminate the lease upon sixty days written notice to the other party. The lease fixed the rent at $1,000.00 a year provided that the property should be used only as a golf course.

7. That lease was extended until April 20, 1955, and on April 20, 1955, it was extended for another term of three years, which term will expire April 20, 1958.

8. The rental due the school board at the rate of $1,000.00 a year has been paid, and for several years past it has been allocated equally between the Senior High School and the Dudley High School for their respective athletic programs.

(See paragraph 15(b) of the school board's answer and the stipulation relating thereto.)

9. The North Carolina General Assembly of 1949 validated the lease dated April 1, 1947, from the school board to the city covering a portion of the golf course and specifically authorized the school board to lease any real property owned by the board and which, in the opinion of the board, would not be needed for school purposes, but in no case for a term exceeding five years, with a further provision that any such original lease might contain a provision for the extension or renewal thereof, with the approval of the board for an additional term not exceeding five years. The act also provided that any such lease might be made privately by the school board or publicly after such notice in such manner and for such length of time as might be prescribed by the board.

(See paragraph 15(b) of the school board's answer and the stipulation relating thereto.)

10. Neither the lease of April 19, 1949, from the school board to the golf club nor either of the two extensions thereof by which it has been continued in effect up to the present time contains any provisions restricting the use of the leased

property to citizens of the white race or otherwise limiting the use thereof in such way as to prevent its use by the plaintiffs or the class which they represent.

11. There is no evidence that the school board, or any person or organization acting with the authority, consent, or knowledge of the school board, ever denied the plaintiffs or any of them or any Negro citizen permission to use the golf course, or ever deprived them or any of them of any rights or privileges they may have with respect thereto, but it leased said property for public use as a golf course and its tenant has denied plaintiffs and others of their race, solely on account of their race, the equal privilege of using it. There is an actual controversy between the plaintiffs and the school board and its tenant with respect to the golf course.

12. That the City of Greensboro, with aid from the Works Progress Administration, constructed a nine hole golf course in Gillespie Park, part of which was on land owned by the Greensboro City Board of Education and leased to City of Greensboro;

13. That until 7 April 1949, City of Greensboro operated the Gillespie Park golf course for the use of White Citizens of Greensboro;

14. That City of Greensboro, pursuant to a request from a group of Negro citizens, and upon the recommendation of the Greensboro Recreation Commission, constructed a nine-hole golf course in Nocho Park for the exclusive use of Negro citizens of Greensboro in an effort to follow the doctrine established in Plessy v. Ferguson, 163 U.S. 537.

15. That on April 7, 1949, respectively, City of Greensboro and Greensboro City Board of Education leased the Gillespie Park golf course to Gillespie Park Golf Club, Inc. and that this lease does not require that the golf course be operated by lessee on a racially segregated basis, but does require it to be used as a public golf course, the sole purpose for the lease, the lease is hereby made a part of this finding.

16. That on September 16, 1950, City of Greensboro leased the Nocho Park golf course to Nocho Park Golf Club,

Inc.; and that this lease does not require that the golf course be operated by lessee on a racially segregated basis, but does require it to be used as a public golf course, the sole purpose for the lease, the lease is hereby made a part of this finding.

17. That the leases of the Gillespie Park Course by the City and the school board have been extended from time to time, so that the lease by the city expires on April 6, 1958, unless it is renewed, and the lease by the school board expires on April 20, 1958, unless it is renewed.

18. That this is a class action brought under and pursuant to Rule 23 of the Federal Rules of Civil Procedure.

19. That each of the plaintiffs is an adult Negro citizen of the United States, and of the State of North Carolina, residing in the City of Greensboro, North Carolina; that the defendant City of Greensboro is a municipal corporation, duly organized and existing under the Constitution and laws of North Carolina; that the defendant Greensboro City Board of Education, is a body politic and corporate, duly organized and existing under the Constitution and laws of North Carolina; that the defendant Gillespie Park Golf Club, Incorporated, is a body corporate, incorporated under the laws of the State of North Carolina, having received its charter on March 26, 1949.

20. On the 15th day of February, 1940, the defendant City of Greensboro and the defendant Greensboro City Board of Education entered into an agreement with the Government of the United States for the construction of a golf course on land, part of which was owned by the City of Greensboro and part by the Greensboro City Board of Education, under which agreement the United States Government provided 65% of the cost of constructing said golf course. That in order to induce the United States Government to provide 65% of the cost, the defendants City of Greensboro and Greensboro City Board of Education agreed with the United States Government that (1) this golf course was "for the use or benefit of the public." (2) that the City of Greensboro would maintain and operate said golf course

for the use and benefit of the public during the useful life of said golf course and (3) that said golf course would not "be leased, sold, donated, or otherwise disposed of to a private individual or corporation, or quasi-public corporation, during the useful life of" said golf course. Said golf course became known as the Gillespie Park Golf Course and is the golf course involved in this action.

21. That the City of Greensboro operated the Gillespie Park Golf Course from 1941 until 1949 for the comfort and convenience of white citizens only.

22. That on or about February 1, 1949, the plaintiff, Arthur Lee, Jr., together with three other Negro citizens of the City of Greensboro, sought the use of the facilities of Gillespie Park Golf Course and were denied said use.

23. On or about February 15, 1949, representatives of the Greensboro Men's Club, an organization of Negro citizens of the City of Greensboro, appeared before the City Council of the City of Greensboro and requested that Negro Citizens be given the right to play golf at the Gillespie Park Golf Course in as much as the city provided no facilities for Negro golfers.

24. That on or about February 17, 1949, a group of Negro citizens of the City of Greensboro appeared before the City Parks and Recreation Commission and requested the use of all of the facilities at the Gillespie Park Golf Course. On March 2, 1949, the City Parks and Recreation Commission adopted a resolution recommending to the City Council of Greensboro "that the City of Greensboro provide golf facilities for the exclusive use of Negro citizens" and that "the golf course located off Asheboro Street, now used by White not be used by Negroes." That the resolution embodying these recommendations was presented to the City Council of Greensboro on March 15, 1949 by John R. Hughes, Chairman of the Greensboro Parks and Recreation Commission and that the recommendations were approved by the City Council on said date.

25. That the Greensboro Parks and Recreation Commission formulates a park and recreation program for the City and

serves the City in an advisory capacity in the formulation of park and recreation budget and policy.

26. That the said John R. Hughes who appeared before the City Council on March 15, 1949 became the chief promoter and prime negotiator of the leases involved in this case. That at the first meeting of the Board of Directors of the corporation he was "authorized and directed to meet with the Greensboro City Council and to have full authority to act on behalf of the corporation in securing a lease of the club house, golf equipment, and as much land as might be leased from the city," and also he "was further instructed and empowered to contact the Greensboro school board and to negotiate an agreement for the lease of the nine-hole golf course on the school property off of Asheboro Street." That the said John R. Hughes did in fact appear before the City Council and the School Board and did persuade them to authorize the leases involved in this case, and at all times involved in these negotiations, the said John R. Hughes was chairman of the Greensboro Parks and Recreation Commission.

27. That the said John R. Hughes who appeared before the City Council on March 15, 1949 became the chief promoter and organizer of the defendant Gillespie Park Golf Club, Inc. That the meetings of the corporation were held in his office and he successively became a director, vice-president, secretary and president of the corporation. That he has been the attorney for the corporation from its inception to the present time.

28. That about seven years have expired under the leases and that during the time a total cumulative membership did not exceed 162 persons, and not more than 60 persons have membership in the corporation at this time. That no meeting of the membership of the corporation has ever been held during the life of the corporation, and that only the members who are also on the board of directors have any voice in the affairs of the corporation. That the board of directors under the by-laws of the corporation is constituted of seven self-perpetuating members who have the sole power and authority to approve persons for membership and to amend or change

the by-laws. That no formal, recorded vote by the board of directors has ever been taken approving any person or persons as members and no meeting held for this purpose, all members appearing on the roll having been approved by telephone conversations between the Golf Professional and an undetermined number of the members of the board of directors.

29. That all of the funds which have been paid out for operating the golf course under the leases have ultimately come from income which the City would have received direct except for the existence of the leases, and that the members and directors of the corporation have not invested a single cent of their own money in the corporation, while at the same time some of them have profited through compensation as officers and employees of the corporation. That during the life of the lease, funds of the defendant City of Greensboro from sources other than the golf course have been invested in the property.

30. That the leases in this case undertook to turn over to a corporation having no assets or income highly v a l u a b l e income-producing property belonging to the City and the school board, the chief officer and promoter of said corporation being an official of the city, and the city having no prospect of getting anything from said leases except out of the income which the leased property was already bringing in, and with the city reserving the right to put into the property further investments from other sources than said income and that under these circumstances said corporation was in fact an agency of the city and the school board for the continued maintenance and operation of the golf course for the convenience of the citizens of Greensboro.

31. That at no time has the City Council of the City of Greensboro either by resolution or by any statement in the leases or in any other formal way, made a finding that this golf course "in the judament of the City Council will not be needed by the City within a period of ten years."

32. While the defendants disclaimed before the court any intent to exclude Negroes from using Gillespie Park Golf

Course they assumed that they have the right to exclude Negroes if they wish to do so, and it is a fact that no Negro has ever been permitted the privilege of playing on the golf course.

33. White citizens of Greensboro are given the privilege of becoming permanent members by paying $60.00 per year without greens fees and others not permanent members by paying $1.00 per year and greens fees of $.75, except on holidays and weekends, when it is more. On days other than holidays or weekends when greens fees are $1.25 white citizens are permitted to play without being members by paying the fees above set forth and without paying the extra $1.00 and without any questions being put to them.

When the plaintiffs applied to be given the same privilege they were refused on the ground that they were not members but primarily because of their color. Plaintiffs laid the greens fees on the table in the club house, went out to play and after they had gotten to the 3rd hole the "pro" in charge of the golf course ordered them off and they insisted that they had a right to play and would not get off unless they were arrested by an officer, whereupon the "pro" had them arrested and they were tried and convicted and sentenced to imprisonment for a period of 30 days, which is the maximum under the law for the State of North Carolina for trespassing.

APPENDIX "F"

CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties and the subject matter of this action. Title 28 U.S.C.A., Sections 2201 and 1343, this action arising under the Constitution and laws of the United States and seeks redress for the deprivation of civil rights guaranteed by the Fourteenth Amendment.

2. That the plaintiffs and other Negroes similarly situated cannot be denied, on account of race, the equal privileges to the park, notwithstanding the lease.

3. The said agreement between the City of Greensboro, the Greensboro City Board of Education, and the United States Government imposed a duty upon the defendants in this case to maintain and operate the Gillespie Park Golf Course during its useful life for the benefit of public, including the Negro public, and that duty could not be voided by the execution of the leases involved in this case.

4. Under the existing lease from the school board the golf club took the school board's portion of the golf course subject to all applicable provisions of law.

5. The school board was not required as a matter of law to include in the lease to the golf club any provision to the effect that in the operation of the golf course there should be no discrimination between the races.

6. The lease from the school board to the golf club is not made invalid by reason of the omission in the lease of any requirement that the golf club comply with the law.

7. That the City of Greensboro has the power to lease land which it owns, for a period not exceeding ten years, under Section 79(e) of Chapter 37, Private Laws of North Carolina, 1923;

8. That City of Greensboro is not required by law, statu-

tory or otherwise, to provide golfing facilities for the use of its citizens; but when it provides such facilities for the citizens, it cannot deny the privilege to Negroes solely because of their race.

This the 24th day of April, 1957.

/s/ Johnson J. Hayes
United States District Judge.

APPENDIX "G"

DECREE AND INJUNCTION:

This cause coming on for hearing and the court having heard the evidence and argument of counsel and carefully considered the same and the briefs filed, and having made the findings of fact and conclusions of law which appear of record:

It is now ORDERED, ADJUDGED and DECREED that defendants have unlawfully denied the plaintiffs as residents of the City of Greensboro, N. C. the privileges of using the Gillespie Park Golf Course, and that this was done solely because of the race and color of the plaintiffs, and constitutes a denial of their constitutional rights, and unless restrained, will continue to deny plaintiffs and others similarly situated:

And be it further ORDERED, ADJUDGED and DECREED:

1. The defendants and each of them, and the officials, servants and employees of each of said defendants are hereby forever restrained and enjoined from disposing of the public property described and used as the Gillespie Park Golf Course, except by a bona fide sale.

Reservation. This court will retain jurisdiction and the power to modify this paragraph upon application and on ten days notice to the plaintiff.

2. The defendants and each of them, and the officers, agents, servants and employees of each of said defendants are hereby forever restrained and enjoined against any discrimination against the plaintiffs or any other Negro resident of the City of Greensboro in the use of said golf course; No restrictions or conditions shall be imposed against the Negroes except those imposed against the White residents of the City of Greensboro. This paragraph shall become effective 40 days after this decree is filed in the office of the Clerk of this court at Greensboro.

3. The application by the City of Greensboro and the Gillespie Park Golf Club, Inc., for a stay pending appeal is

denied because of the delay of the effective date of paragraph 2 hereof, in which time the defendants can apply to the Circuit Court for a stay. It has been known by the defendants since March 18, 1957, that the decree would be entered and time was allowed by the court for the parties to agree on a date, as this court was unwilling to deny the plaintiffs their constitutional rights except by their consent.

Except as stated above this decree shall take effect upon its filing in the office of the Clerk of this court at Greensboro, N. C.

It is ORDERED that the costs be taxed against the defendants City of Greensboro and The Gillespie Park Golf Club, Inc. No cost is to be taxed against the School Board because it had leased the property to the City and the City induced the School Board to transfer the lease to the Golf Club. It does not appear that the School Board promoted or encouraged the discriminatory conduct of the co-defendants.

Entered April 24, 1957.

/s/ Johnson J. Hayes
U. S. District Judge.

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JAMES R. BROWNING, Clerk

In The

Supreme Court of the United States

October Term, 1958

No. [redacted]

PHILLIP COOKE, LEON WOLFE, GEORGE SIMKINS, JR., JOSEPH STURDIVENT, SAMUEL MURRAY, and ELIJAH H. HERRING,

Appellants,

vs.

STATE OF NORTH CAROLINA,

Appellee.

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

MOTION TO DISMISS

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In The

Supreme Court of the United States

October Term, 1958

No. 466

PHILLIP COOKE, LEON WOLFE, GEORGE SIMKINS, JR., JOSEPH STURDIVENT, SAMUEL MURRAY, and ELIJAH H. HERRING,

Appellants,

vs.

STATE OF NORTH CAROLINA,

Appellee.

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

MOTION TO DISMISS

The Attorney General of North Carolina in behalf of the State of North Carolina, Appellee, moves to dismiss this appeal and to affirm the judgment below, for the following reasons:

(1) For that the judgment of the Supreme Court of North Carolina is grounded upon and rests upon an adequate, tenable, non-federal basis.

(2) For that any federal question attempted to be raised by the Appellants and for which review is now sought before this Court was not timely or properly raised before the trial court and was not expressly passed upon by the Supreme Court of North Carolina.

(3) For that the federal question attempted to be raised by the Appellants on the issue of former jeopardy because of defect in the original warrants does not present a substantial federal question.

(4) For that the decision of the Supreme Court of North Carolina rests upon a separate and independent, adequate and tenable non-federal ground independent of any decision of a federal question.

STATEMENT OF THE CASE

It is important that this Court understand the way and manner in which this case arose and the various steps taken in connection with the two trials, both of which have been passed upon by the Supreme Court of North Carolina. The Appellee, State of North Carolina, gives a summary of the events as follows:

(a) The Appellants are six colored men, and they were originally indicted on warrants issued from the Greensboro Municipal-County Court upon charges of having violated Sec. 14-134 of the General Statutes of North Carolina, which in part reads as follows:

> "If any person, after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars, or imprisoned not more than thirty days."

(b) The Court will note that the above warrants charged the Appellants with unlawful and willful trespass "upon the property of Gillespie Park Golf Course, Greensboro, North Carolina, after being forbidden to do so." The Appellants were found guilty in the Municipal-County Court on February 6, 1956, and appealed to the Superior Court, which is a Court of General Jurisdiction, and where the cases were consolidated for trial.

(c) During the progress of the trial in the Superior Court

the prosecuting officer obtained the permission of the Court to amend the warrants so that they would read or describe the trespass as having been committed upon the premises of "Gillespie Park Golf Club, Inc., after having been forbidden to enter said premises and not having a license to enter said premises ****." The jury returned a verdict of Guilty as to each Defendant, and the Defendants (Appellants herein) appealed to the Supreme Court of North Carolina.

(d) The Supreme Court of North Carolina decided on the appeal that when the prosecuting officer amended the warrant so as to charge a trespass upon the property of a person other than that named in the original warrant, then one criminal charge was substituted for another and that under local State practice this was a fatal variance, and the judgment was arrested. In arresting the judgment the Justice who wrote the opinion for the Court said:

> "Defendants may, of course, now be charged under the original warrant since the Court was without authority to allow the amendment changing the crime charged; or they may be tried on bills found in the Superior Court for the crime attempted to be charged by the amendment."

This was amplified by Mr. Justice Parker in a concurring opinion, when he said:

> "It seems plain that a verdict of conviction or acquittal on the warrants in this case as drawn would not be a bar to the new warrants in the form to which they were changed by the amendments."

This language will become important later on when we discuss the Appellants' plea of former jeopardy. This case is reported as; STATE v. COOKE, ET ALS. 246 N. C. 518, 98 S. E. 2d 885.

(e) The above opinion of the Supreme Court was filed on June 28, 1957. While the first case was pending in the Supreme Court of North Carolina the Appellants instituted an action in the United States District Court for the Middle Dis-

trict of North Carolina against the City of Greensboro, the Greensboro City Board of Education and the Gillespie Park Golf Club, Inc., and secured a general declaration from that Court to the effect that the Appellants could not be denied because of color equal privileges to use the golf course in question (SIMKINS v. CITY OF GREENSBORO, 149 F. Supp. 562; Affirmed: CITY OF GREENSBORO v. SIMKINS, 246 F. 2d 425). Further along in this argument we will show the Court that the State of North Carolina has never denied the right of colored citizens to play on the golf course if they met the same eligibility conditions that were required of white persons. The decision of the Circuit Court of Appeals is dated June 28, 1957. The Court will further note that the State of North Carolina was in no manner made a party to this civil action in the Federal Court.

(f) On the 2nd of December, 1957, the Appellants were indicted again on new warrants issued from the Greensboro Municipal-County Court again charging the violation of G. S. 14-134, above quoted, and this time charging that the trespass was committed upon the premises of "Gillespie Park Golf Club, Inc. after having been forbidden to enter said premises." The Appellants moved in the Municipal-County Court to quash the warrants, and this being overruled they entered pleas of Not Guilty, and upon being convicted the Appellants appealed to the Superior Court where the cases were consolidated for trial and were heard at the February 3, 1958, Criminal Term of Guilford County. The Defendants renewed their Motions to Quash as originally made, and these Motions were overruled by the Court. The Appellants were found Guilty by the jury and again appealed to the Supreme Court of North Carolina where the case was again heard, and the Supreme Court of North Carolina in an opinion filed June 4, 1958 found no error in the trial below (STATE v. COOKE, ET AL., 248 N. C. 485, 103 S. E. 2d 846). The opinion of the Supreme Court of North Carolina, relating to the first trial, is set forth in Appendix "C" of the Appellants on p. 55, and the opinion of the Supreme Court of North Carolina, in the second case, the same being the opinion and judgment from which this appeal has been noted, appears in the Appellants'

Statement as to Jurisdiction as Appendix "A" on p. 42, and the Judgment appears as Appendix "B" on p. 54. For this reason the two opinions will not be duplicated.

(g) The contentions of the Appellants made in the last trial (the trial that is now being reviewed) are stated in their Motion to Quash, which appears in State Record on p. 28. The Court will note that the constitutionality of G.S. 14-134 is not specifically attacked or brought in question but the application, or administration, of the statute is the subject of constitutional attack by the Appellants. The appellants contend also that the State of North Carolina cannot prosecute them since the decision in the Federal Court because of the Supremacy Clause of the United States Constitution, and they also invoke the doctrine of collateral estoppel. The Appellants further contend that under the circumstances in this case they would be placed again in jeopardy contrary to the Fifth Amendment of the Constitution of the United States "as incorporated into the Fourteenth Amendment." These are the essential contentions of the Appellants.

ARGUMENT

I

THE QUESTION OF RACIAL DISCRIMINATION IN THE USE OF THE GOLF COURSE WAS NOT INVOLVED IN THIS CASE.

Strange as is may seem, the Appellants have attempted at all times to convert this case into one of racial discrimination when the evidence clearly shows that such a question was not involved. This is also shown by the instructions of the trial court given to the jury and by the opinion of the Supreme Court of North Carolina. The Appellants introduced into evidence certain leases and deeds to show the status of the golf course property. The construction and effect of these leases and deeds would be a question of local State law, and we should not be required to cite authority to support this point. The introduction of these exhibits begins on State Record,

p. 52. The effect of these instruments is so well stated by the Supreme Court of North Carolina in its opinion that we quote from the opinion to explain this situation. The quotation from the opinion also contains certain bylaws adopted by the Lessee which are important in the case. So far as eligibility to play on the golf course is concerned all races are bound by these bylaws, and we think they are valid unless administered in a discriminatory manner. The quotation is as follows:

> "Defendants offered in evidence a lease dated 19 April 1949 from the Board of Trustees of the Greensboro City Administrative Unit to Gillespie Park Golf Club, Inc. This lease recited that the property therein described had in 1947 been leased to the City of Greensboro so that the city might operate a golf course thereon, that Greensboro had agreed to cancel its rights under the lease, that lessor was of the opinion that it would not need the property for school purposes during the next ensuing five years and 'since a nine hole golf course has been laid out thereon, the Board of Trustees is of the opinion that it is advisable to lease the property to the Golf Club in order that its use as a golf course may be continued during the term of this lease, such use being, in the opinion of the Board of Trustees, a public or semipublic use.' The lease was for a period of five years at a rental of $1000.00 per annum, but with a provision that lessor might cancel upon sixty days' notice if the property was needed for school purposes or if lessor desired to sell. An extension agreement was put in evidence extending lessee's term. The asserted trespass occurred during the extended term.
>
> "There is evidence that lessee had, during its term, expended more than $100,000 in enlarging the course from a nine-hole course to an eighteen-hole course, constructing a club house, and making other improvements. Defendants offered in evidence bylaws adopted by lessee. The only two which may have any pertinency to this action are sections 1 and 2 of article 1. They provide: 'SECTION 1—Membership. Membership in this corporation shall be restricted to members who are approved by the Board of Directors for membership in this Club. There shall be two types of membership; one, the payment of a stipulated fee of $30.00 or more, plus tax, shall cover membership and greens fees. The other type of membership shall be $1.00, plus tax, but this type of member shall pay greens fees each time he uses the

course. The greens fees and the amount of membership fees may be changed by the Board of Directors at any time upon two-thirds vote of the members of the Board. SECTION 2—Use of Golf Facilities. The golf course and its facilities shall be used only by members, their invited guests, members in good standing of other golf clubs, members of the Carolina Golf Association, pupils of the Professional and his invited guests.'

"The City Administrative Unit, a governmental agency separate and distinct from the City of Greensboro, had no authority to operate recreational facilities which were not in some way related to the operation of the public school system. The Legislature created both County and City Administrative Units 'for purposes of school administration.' G. S. 115-4. The Administrative Unit, having acquired more land than was presently needed for school purposes, had legislative authority to lease the surplus. G. S. 115-126 (5), *Cline v. Hickory*, 207 N. C. 125, 176 S. E. 250; 38 Am. Jur. 169. In the exercise of its discretion it could in good faith lease for a public or a private purpose. Prior to its lease to Gillespie Park Club, it had leased the property to the City of Greensboro. The City had apparently used it for recreational purposes and had erected a golf course thereon. When that lease terminated, the school authorities leased to a private corporation, but in their lease were careful to state that lessee was taking and would use it for public or semipublic purposes, namely, the operation of a golf course. Having expressly declared that the use which the lessee would make was a public or semipublic use, the law will presume the parties intended and contemplated that the property should be used without unlawful discrimination because of race, color, religion, or other illegal classification. 'It is an elementary rule of construction that parties will be presumed to have used language effectuating a lawful purpose rather than one which is unlawful.' *Beasley v. R. R.*, 145 N. C. 272; *Newberry v. City of Andalusia*, 57 So. 2d 629. Since the operator of the golf club was charged with making a public or semipublic use of the property, it could not deny the use of the property to citizens simply because they were Negroes. This Court gave definite recognition to the principle of equality of treatment as between whites and Negroes nearly three quarters of a century ago. *Puitt v. Commissioners*, 94 N. C. 709.

"*Dawson v. Mayor and City Council of Baltimore City*,

220 F. 2d 386; *Lawrence v. Hancock*, 76 F. Supp. 1004; *Tate v. Department of Conservation and Development*, 133 F. Supp. 53; *Culver v. City of Warren*, 83 N. E. 2d 82, cited and relied upon by appellants are but applications of an established legal principle to the factual situations found to exist is each of those cases. This case in no wise questions the soundness of the legal principles there enunciated."

The Court will further note that the trial judge charged the jury that the City of Greensboro could not permit its lessee, the Gillespie Park Golf Club, Inc., to discriminate against any citizen of Greensboro in the operation of the course and that the lessee could not exclude either defendant because of his race and that the defendants were entitled to the same rights to use the golf course as any other citizen of Greensboro would be provided they complied with the reasonable rules and regulations for the operation of the golf course (see instructions of trial court, State Record p. 85).

The evidence shows that the Gillespie Park Golf Club, Inc., the Lessee, acquired the golf course when it consisted of only nine holes and that the corporation invested about $100,000 in improvements and expanded it into an 18-hole golf course, and, further, they built a club house at a cost of about $5000. The President testified that "Members of other golf clubs were not entitled to play our golf course without first filing an application with the Club. Only our members had a right to play on the golf course." He further testified that the right to play included invited guests of members in good standing and also members in good standing of other clubs that were members of the Carolina Golf Association (see State Record p. 75). When the Appellants arrived at the golf course they went into the golf shop where Mr. Clyde Bass, Assistant Professional, was present, and demanded that they be allowed to play golf. They were told by Mr. Bass that the course was for members and their invited guests only and that they could not play. Five of them dropped 75¢ on the counter, which money was not accepted, and after being told that they could not play they went ahead and played anyway. When the Manager and Golf Professional arrived at the Club he was

told of the situation and that the Appellants did not have permission to play. He ordered the Appellants to leave and when they did not, he called the Deputy Sheriff. However, the Appellants continued to play until they completed nine holes of golf in a playing time of 1-1/2 to 2 hours. The evidence of Mr. Edwards, the Golf Professional, State Record p. 42) shows the different types of membership and that lockers were maintained for no persons other than members. The evidence further shows that the Appellants did not show any credentials or anything that would show that they had a right to play on the course or that they belonged to a club that was a member of the Carolina Golf Association. In other words, nothing was presented to show that they belonged to a club that was a member of an association which granted reciprocal privileges with this golf club (see State Record, p. 45). The Appellants were never told they could not play because they were colored, nor, in fact, did the question of race enter into the matter at all, and the evidence clearly shows that so far as the Manager and Supervisor of the golf course was concerned he was only interested in their eligibility to play just as he would be if any other person presented himself and said he was going to play.

The trial judge recognized that color had nothing to do with the right of Appellants to play on the golf course and so told the jury, and the Supreme Court of North Carolina recognized that fact and further stated that it (the Supreme Court of North Carolina) did not question the soundness of the legal principles set forth in DAWSON v. MAYOR AND CITY COUNCIL OF BALTIMORE CITY, 220 F. 2d 386; LAWRENCE v. HANCOCK, 76 F. Supp. 1004; TATE v. DEPARTMENT OF CONSERVATION AND DEVELOPMENT, 133 F. Supp. 53; CULVER v. CITY OF WARREN, 83 N. E. 2d 82.

We do not understand that the Appellants have superior privileges because of their color but we do understand that they cannot be discriminated against because of their color. Appellants are subject to the same eligibility conditions as any other race. This point was expressly decided in FRASIER v. BOARD OF TRUSTEES OF THE UNIVERSITY OF

NORTH CAROLINA, 134 F. Supp. 589, where a 3-Judge District Court decided that eligible Negroes could not be prohibited from attending the University of North Carolina because of their color. The Court was careful to say, however, that the Board of Trustees of the University had the power to decide as to whether or not applicants for admission were eligible, the Court saying:

> "But we decide only that the Negroes as a class may not be excluded because of their race or color; AND THE BOARD RETAINS THE POWER TO DECIDE WHETHER APPLICANTS POSSESS THE NECESSARY QUALIFICATIONS. This applies to the plaintiffs in the pending case, as well as to all Negroes who subsequently apply for admission (Emphasis ours)."

There being no reciprocal agreement between the Gillespie Park Golf Club and Nocho Park Golf Club with reference to playing on the golf course (State Record, p. 75) the Appellants were simply not eligible to play on the golf course, and it was not a question of color.

The Appellants had prepared for sometime to make a test case. They communicated with an attorney and obtained an opinion (State Record, p. 48). In summary: The Appellants were excluded from the golf course, not because of any racial reasons, as it was well understood that color had no place in such exclusion, but because Appellants simply refused to show that they were eligible to play on the golf course, and under such conditions persons of the while race would have been equally excluded. The case was decided on the point of eligibility, and the jury was specifically told that so far as color was concerned the Appellants had as much right to play on the golf course as any person of any other race.

II

THE APPELLANTS DID NOT PROPERLY PRESENT ANY CONSTITUTIONAL QUESTION RELATING TO THE EFFECT OF THE FINDINGS OF FACT AND JUDG-

MENT OF THE FEDERAL COURT.

Before the Supreme Court of North Carolina the Appellants relied greatly upon the fact that the District Court of the United States had made certain adjudications in their favor (SIMKINS v. CITY OF GREENSBORO, 149 F. Supp. 562; Affirmed CITY OF GREENSBORO v. SIMKINS, 246 F. 2d 425) and that because of the doctrine of collateral estoppel the State was bound by the Federal Court judgment, and this gave the Appellants, so they contend, the right to play on the golf course.

The fact remains, however, that while the Appellants had the Record of the proceedings in the Federal Court in their custody and examined the Deputy Clerk of the Federal Court in regard to the identity of same (see State Record, p. 69) the Appellant never at any time offered this Federal Record in evidence. In fact, the Appellants themselves say in their statement as to jurisdiction filed in this Court, as follows:

> "The Record is silent as to the identification of these Federal Court Records as Exhibits 6 and 7, but the Supreme Court of North Carolina says in its opinion in this case the following with reference to said Federal Court Records:
>
> " 'Although the defendants had the Record in that case identified, they did not offer it in evidence.' " (See State Record, p. 77)

The Appellants try to say that these were Exhibits 6 and 7 but if this Court will examine the State Court Record it will find that Exhibits 6 and 7 do not appear in the Record at all, and we do not know what Exhibits 6 and 7 may be. The State not being a party to the action in the Federal Court, which was Civil in nature, was certainly not bound by any judgment in the Federal Court in a criminal prosecution with different burden of proof and different issues.

The doctrine of collateral estoppel has been applied by this Court in various cases, but it is believed that it has always been between the same parties.

See:

YATES v. UNITED STATES, 354 U. S. 298, 1 L. ed. 2d 1356, 77 S. Ct. 1064;
U. S. v. OPPENHEIMER, 242 U. S. 85, 61 L. ed. 161, 37 S. Ct. 68;
SEALFON v. UNITED STATES, 332 U. S. 575, 92 L. ed. 180, 68 S. Ct. 237.

It will be observed that the above cases all represent situations where both cases were tried in the Federal Courts and not the situation where one case is tried in Federal Court and the other case is tried in the State Court.

See, also, other cases on the subject, as follows:
CROMWELL v. COUNTY OF SAC, 94 U. S. 51, 24 L. ed. 681;
SOU. PAC. R. R. CO. v. UNITED STATES, 168 U. S. 1, 48, 42 L. ed. 355;
BANKERS COAL CO. v. BURNET, 287 U. S. 308, 77 L. ed. 325;
TAIT v. WESTERN MD. RY. CO., 289 U. S. 620, 623, 77 L. ed. 1405.

There are also several cases in the various District Courts and Circuit Courts of Appeal, as follows:

THE EVERGREENS v. NUNAN, 141 F. 2d 927, 928;
ENGINEERS CLUB OF PHILADELPHIA v. UNITED STATES 42 F. Supp. 182, 187;
UNITED STATES v. SILLIMAN, 167 F. 2d 607, 612;
BUROMIN CO. v. NATIONAL ALUMINATE CORP., 70 F. Supp. 214, 218;
UNITED STATES v. BOWER, 95 F. Supp. 19, 21;
HEDDEN v. UNITED STATES, 105 F. Supp. 1010, 1017;
CHARLES E. HARDING CO v. HARDING, 88 A. L. R. 563, Annotation p. 574.

It is believed that North Carolina follows the usual rule as to collateral estoppel where it is based upon sufficient evidence. See:

KING v. NEESE, 233 N. C. 132; 63 S. E. 2d 123;
COACH CO. v. STONE, 235 N. C. 619, 621; 70 S. E. 2d 673;

HERRING v. COACH CO., 234 N. C. 51, 53, 54; 65 S. E. 2d 505;

CANNON v. CANNON, 223 N. C. 664, 669; 28 S. E. 2d 240.

The Appellants having failed to properly present their case and to introduce into evidence the Record developed in the Federal District Court as a last resort say that the Supreme Court of North Carolina should take judicial notice of the facts and the law in the SIMKINS case. There are two fallacies in this position: (1) In their Motion to Quash, the Appellants said they would introduce the Record in evidence, and (2) The trial court was never asked to pass upon the question of judicial notice (see State Record in the whole case, p. 30).

This position, however, was considered by the Supreme Court of North Carolina in its opinion, and while the Supreme Court of North Carolina recognized the supremacy of the federal decisions, recognizing the right of colored people to play on golf courses and attend recreation centers without discrimination, nevertheless, it is believed that the Court's opinion is based on the principle that it did not have to take judicial notice of the judgment and facts in the federal case. There are many cases cited to support this position but it seems to us that one case is decisive. In the case of SCHULER v. ISRAEL, 120 U. S. 506, 30 L. ed. 707, the plaintiff had brought suit in the Circuit Court of the City of Saint Louis, Missouri, against Israel on a note. Israel appeared and filed an Answer and set up as a defense that before the institution of the present suit in the Missouri Court, the plaintiff had commenced an action on the same note in the Circuit Court of the United States for the Northern District of Texas and had recovered judgment against Israel and that the note was merged in the judgment, and, therefore, no judgment could be rendered for the plaintiff in the State Court. In disposing of this contention, Mr. Justice Miller said:

"While it is certainly true that the pendency of a suit in one court is not a defense, though it may sometimes be good in abatement, to another suit on the same cause of action in another court of concurrent jurisdiction, it may be considered as established that when a judgment is recovered against the defendant in one of those courts, if it is a full and complete judgment on the whole cause of action it may be pleaded as a defense to the action in the court where it is pending and undecided. *Neither court would be bound to take notice of the judgment in the other court judicially,* but when the matter is pleaded in due time and it is made to appear that a judgment on the same cause of action has been recovered and is in full force and effect, that judgment must be held to merge the evidence of the debt, whether that evidence be parol or written, in the judgment first recovered." (Emphasis ours)

It is not believed that the interpretation of a State court as to when it will take judicial notice or questions as to the competency of evidence results in a federal question.

III

THERE IS NO SUBSTANTIAL QUESTION AS TO FORMER JEOPARDY.

As we pointed out in the Statement of the Case in the first trial the Supreme Court of North Carolina decided (STATE v. COOKE, ET AL., 246 N. C. 518, 98 S. E. 2d 885) that the prosecuting officer did not have a right to amend the warrant so as to charge another ownership or possession of the property on which it was alleged the trespass was committed. The Court said that this was a fatal variance and cited previous decisions to support its view. The Appellants rely on a statement in the opinion that they could again be tried on bills found in the Superior Court or under the original warrant. However, it is pointed out in the concurring opinion that they should be tried again on new warrants, and the former trial on the old warrants would not be a bar. The Record shows that the Appellants were tried on new warrants issuing from the Greensboro Municipal-County Court, and this was correct. Mr. Justice Rodman, who wrote the opinion

in the case now before the Court, also wrote the opinion in the first trial. In holding that the new warrants were proper and not bills of indictment, Mr. Justice Rodman pointed out that in the first opinion he had overlooked the Proviso to G. S. 7-64, which denied to the Superior Court in Guilford County the right to exercise concurrent jurisdiction with inferior courts. On this point and in the opinion now before the Court, Mr. Justice Rodman said:

> "The last clause of that opinion is also relied on in the motion to quash. The statement, accurate as to most of the counties of the State, is inaccurate with respect to Guilford and the other counties enumerated in the proviso to G. S. 7-64. The Legislature, in the exercise of its discretion, has denied to the Superior Court sitting in the counties named in the proviso to G. S. 7-64 the right to exercise concurrent jurisdiction with inferior courts in the trial of misdemeanors. Because of the limitations so imposed on the jurisdiction of the Superior Court of Guilford County, it could not exercise original jurisdiction of the crime charged, namely, trespass, after being forbidden, and if defendants were to be prosecuted for the trespass presently charged, the prosecution had to originate in a court inferior to the Superior Court. This is made clear in the concurring opinion of Justice Parker, who said: 'It seems plain that a verdict of conviction or acquittal on the warrants in this case as drawn would not be a bar to the new warrants in the form to which they were changed by the amendments.'"

It has long been held in North Carolina that a variance in a bill of indictment or warrant does not create a situation in which former jeopardy attaches.

STATE v. HICKS, 233 N. C. 511, 64 S. E. 2d 871, cert. den. 342 U. S. 381, 96 L. ed. 629;

STATE v. MARSH, 132 N. C. 1000, 43 S. E. 828;

STATE v. JOHNSON, 226 N. C. 266, 37 S. E. 2d 678.

It is believed that this position is also in accord with the position of the United States Courts on the subject.

HILL v. TEXAS, 316 U. S. 400, 86 L. ed. 1559;

STROUD v. UNITED STATES, 251 U. S. 15; 64 L. ed. 103;
BURTON v. UNITED STATES, 202 U. S. 344, 378, 50 L. ed. 1057;
BROCK v. NORTH CAROLINA, 344 U. S. 424, 97 L. ed. 456;
GAVIERS v. UNITED STATED, 220 U. S. 338, 342-343, 55 L. ed. 489;
UNITED STATES v. OPPENHEIMER, 242 U. S. 85, 87, 61 L. ed. 161;
UNITED STATES v. JONES, 31 F. 725;
WALKOFF v. UNITED STATES, 84 F. 2d 17;
AMRINE v. TINES, 131 F. 2d 827;
UNITED STATES v. AGRESTI, 39 F. Supp. 16;
UNITED STATES v. PISATURO, 58 F. Supp. 546;
UNITED STATES v. NARRAEZ-GRANILLO, 119 F. Supp. 556.

It would seem that the Supreme Court of North Carolina applied the simple rule as to whether or not the facts alleged in the second indictment, if given in evidence, would have sustained a conviction under the first indictment.

It will further be seen that the Appellants did not follow the State practice in raising the question of former jeopardy. On this point the Supreme Court of North Carolina said, in STATE v. HICKS, supra:

> "Whether the facts alleged in the second indictment, if given in evidence, would have sustained a conviction under the first is always to be determined by the court from an inspection of the two indictments. *S. v. Nash, supra.* Whether the same evidence would support a conviction in each case is to be determined by a jury from extrinsic testimony if the plea of former jeopardy avers facts *dehors* the record showing the identity of the offense charged in the first with that set forth in the last indictment. *S. v. Bell, supra.*
>
> "When these rules are laid alongside the case at bar, it is clear that the judge rightly refused to submit to the jury the two specific issues tendered by the defendant

and rightly rejected the plea of former acquittal. The plea merely set forth the several indictments and the result of the former trial, and drew the legal conclusion from these bare matters that the defendant was being twice put in jeopardy for the same offense. It did not aver any facts *dehors* the record showing the identity of the crimes charged in the former indictments with those described in the present one. These things being true, the plea was insufficient, for it revealed on its face the non-identity of the several offenses. The defendant's legal standing would not be bettered a whit, however, on this phase of the case if his plea of former acquittal had gone beyond the record and invoked the extrinsic testimony. This is so because evidence of a conspiracy to damage or injure property owned or used by the Duke Power Company will not support a conviction of a conspiracy to damage or injure property owned or used by the Jefferson Standard Broadcasting Company. *S. v. Hicks, supra; S. v. Crisp*, 188 N. C. 799, 125 S. E. 543."

On the point of former jeopardy, as well as the point of the introduction of the Federal Record in evidence, the Appellants complain that under State practice the Supreme Court of North Carolina said in substance that a Motion to Quash was the proper method of testing the sufficiency of the warrant, information or bill of indictment to charge a criminal offense but it was not a means of testing the guilt or innocence of the defendant and that on such a Motion the Court could not consider extraneous evidence or evidence *aliunde* the record, and for this position the Supreme Court of North Carolina cited STATE v. COCHRAN, 230 N. C. 523, 53 S. E. 2d 633. The Appellants say that to the contrary in STATE v. PERRY, 248 N. C. 334, 103 S. E. 2d 404, a colored defendant was allowed to successfully attack a bill of indictment on the grounds of systematic exclusion of Negroes by a Motion to Quash which requires evidence in such case outside the record. The answer to this is that under the North Carolina practice an attack on the trial panel for race exclusion is made by a challenge to the array (STATE v. KIRKSEY, 227 N. C. 445, 42 S. E. 2d 613) and to challenge the constitution of the grand jury for racial reasons it is especially provided by statute that a Motion to Quash shall be used (STATE v. PEOPLES, 131 N. C. 784, 42 S. E. 814).

G. S. 9-26 of the North Carolina Code is in part as follows:

> "All exceptions to grand jurors for and on account of their disqualifications shall be taken before the jury is sworn and impaneled to try the issue by motion to quash the indictment, and if not so taken the same shall be deemed to be waived."

The Appellants also raise the question that the Supreme Court of North Carolina had previously held (STATE v. CLYBURN, 247 N. C. 455, 101 S. E. 2d 295) that the statute was only applicable to the possession or right of possession of real estate privately held, and that in the Clyburn case the Appellants, who were colored people, were allowed to raise the question that in merely exercising constitutional rights such can be shown and taken advantage of under a motion for nonsuit. The answer is that the Appellants were allowed to show in the actual trial, if they could do so, that they entered upon the premises upon a *bona fide* belief of a right to so enter. The Supreme Court of North Carolina has not changed its rule in interpreting the statute because the evidence showed that the property was in the possession of a private corporation even though it was impressed with a non-discriminatory use. The cases decided by the Supreme Court of North Carolina on this point all appear in the case of STATE v. BAKER, 231 N. C. 136, 56 S. E. 2d 424, and as pointed out by the Supreme Court of North Carolina the Appellants never at any time denied the fact that the corporation named in the warrant had physical possession of the property nor did they ever deny that they took possession over the protest of the agent of the corporation.

IV

THE EFFECT OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

The Appellants contend that under Article VI, Clause 2, of the Federal Constitution, the Supreme Court of North Carolina was bound to recognize the federal cases dealing with golf courses, and when this is done Appellants should be declared Not Guilty.

The answer to this is that the Supreme Court of North Carolina did recognize the principles decided by the federal cases, and the trial judge also instructed the jury on the same principles but the Supremacy Clause does not require State Courts to accept facts found in the Federal Court in which the State was not a party.

The Supreme Court of North Carolina has always recognized the decisions of the Supreme Court of the United States as being the Law of the Land, and although the Supreme Court of North Carolina did not agree with the interpretation of this Court in the Brown case, (CONSTANTIAN v. ANSON COUNTY, 244 N. C. 221, 93 S. E. 2d 163,) nevertheless, the Court said:

> "However that may be, the Constitution of the United States takes precedence over the Constitution of North Carolina. Constitution of North Carolina, Article I, section 3 and 5; Constitution of the United States, Article VI. In the interpretation of the Constitution of the United States, the Supreme Court of the United States is the final arbiter. Its decision in the *Brown* case is the law of the land and will remain so unless reversed or altered by constitutional means. Recognizing fully that its decision is authoritative in this jurisdiction, any provision of the Constitution or statutes of North Carolina in conflict therewith must be deemed invalid."

Because the Appellants are colored people, the Supremacy Clause of the Federal Constitution does not overleap all State practice in properly raising federal questions in the trial court nor does it relieve Appellants of the same conditions of eligibility for the use of a privilege that are required of all races. We are fully aware of what this Court said in the case of COOPER v. AARON, U. S. , 3 L. ed. 2d 5, and, as we have shown, the Supreme Court of North Carolina agrees with this position. If the Supreme Court of North Carolina had refused to apply this principle, then, of course, the question would be different, but the fact remains that the State Court in this instance and in all others has recognized the Supremacy Clause when it is applicable.

V

APPELLANTS ARE REQUIRED TO PRESENT FEDERAL QUESTIONS IN STATE COURTS ACCORDING TO STATE PRACTICE.

While we agree that Appellants must have an opportunity afforded by State practice to present federal questions we also think that it is the rule that State practice must be followed, and State procedure controls in the presentation of federal questions or constitutional questions. In this case Appellants filed a Motion to Quash alleging certain facts by which they hoped to take advantage of the doctrine of collateral estoppel and which they did not support by evidence. Appellants had the right to contend that they had a right to go upon the premises in question, and this view was submitted to the jury with proper instructions that they could not be excluded because of race. It is clear that Appellants were not entitled to play on the golf course because of the membership conditions and bylaws which had nothing to do with race and which were applicable to all persons and races alike, and it was upon this theory that the case was tried and decided. In this sense the present case has no comparison to the case of MARSH v. ALABAMA, 326 U. S. 501, 90 L ed. 265. In the Marsh case the issue was clear that the trespass statute of Alabama as applied to the defendant in the case could not be enforced because of the interposition of the First and Fourteenth Amendments guaranteeing freedom of the press and of religion, thus enabling the Appellant, or defendant, in that case to distribute religious literature on the streets of a company-owned town. It is clear that in the case now before the Court the constitutional rights of the Appellants were never denied. Indeed, the evidence shows that no sets of facts or circumstances were ever shown or produced which brought into play the application of the Fourteenth Amendment.

We have already cited and quoted from North Carolina cases showing that the Appellants did not properly present the question of former jeopardy. Under these circumstances we think the statement of this Court in the case of JOHN v.

PAULLIN, 231 U. S. 583, 585, 58 L ed. 381, 383, is appropriate. This Court, there said:

> "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law."

See also:

C. I. O. v. McADORY, 325 U. S. 472, 477, 89 L. ed. 1741;
PARKER v. ILLINOIS, 333 U. S. 571, 92 L. ed. 886;
CENTRAL UNION TEL. CO. v. EDWARDSVILLE, 269 U. S. 190, 70 L. ed. 229;
C. & O. R. CO. v. McDONALD, 214 U. S. 191, 53 L. ed. 963;
HARDING v. ILLINOIS, 196 U. S. 78, 49 L. ed. 394.

In TARRANCE v. FLORIDA, 188 U. S. 519, 47 L. ed. 572, it was held that where the State practice required a plea in abatement instead of a motion to quash that this Court would follow the State practice.

In BAILEY v. ANDERSON, 326 U. S. 203, 206-7, 90 L. ed. 3, this Court said:

> "Inspection of the record does not show that, in denying the writ of error, the state court passed upon any constitutional question not raised or passed upon in the course of the proceedings below. Such appears not to be its practice. Rule 22 of the Rules of the Supreme Court of Appeals, 181 Va lxxv; cf. Ward Lumber Co. v. Henderson-White Mfg. Co. 107 Va 626, 628, 629, 59 S. E. 476, 17 LRA (NS) 324; Bliss v. Spencer, 125 Va. 36, 50, 99 S. E. 593, 5 ALR 619; Reynolds v. Adams, 125 Va. 295, 314, 99 S. E. 695. On this record we cannot say that the interest claimed was not included in the award, or, if it was not, that the Supreme Court of Appeals of Virgina, by denying writ of error, passed upon any question of the constitutionality of such denial of interest, not raised on the record or passed upon below. Unless this affirmatively appears upon the record brought here for review on ap-

peal, this court is without jurisdiction of the appeal. Jacobi v. Alabama, 187 U. S. 133, 135, 136, 47 L. ed. 106-108, 23 S. Ct. 48; Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 309, 47 L. ed. 480, 485, 23 S. Ct. 375, 63 LRA 33; Chicago, I. & L. R. Co. v. McGuire, 196 U. S. 128, 131, 49 L. ed. 413, 415, 25 S. Ct. 200. See Flournoy v. Wiener, 321 U. S. 253, 262, 263, 88 L. ed. 708, 714, 715, 64 S. Ct. 548, and cases cited."

In WILLIAMS v. GEORGIA, 349 U. S. 375, 99 L. ed. 1161, this Court said:

"A state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power."

In EDELMAN v. CALIFORNIA, 344 U. S. 357, 97 L. ed. 387, this Court said:

"It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law. Hulbert v. Chicago, 202 U. S. 275, 50 L. ed. 1026, 26 S. Ct. 617 (1906); Mutual Life Ins. Co. v. McGrew, 188 U. S. 291, 308, 47 L. ed. 480, 484, 23 S. Ct. 375, 63 LRA 33 (1903). Noncompliance with such local law can thus be an adequate state ground for a decision below."

See, also, the following cases:

LAYTON v. MISSOURI, 187 U. S. 356, 47 L. ed. 214;
MORRISON v. WATSON, 154 U. S. 111, 38 L. ed. 927;
BALDWIN v. KANSAS, 129 U. S. 52, 32 L. ed. 640;
BROOKS v. MISSOURI, 124 U. S. 394, 31 L. ed. 454;
SPIES v. ILLINOIS, 123 U. S. 131, 31 L. ed. 80.

The defendants made a motion in arrest of judgment in which was incorporated again the Motion to Quash, and under North Carolina practice these motions made after conviction are discretionary with the trial court and will not be reviewed by the Supreme Court (STATE v. CLYBURN, 247

N. C. 455, 101 S. E. 2d 295). Under North Carolina practice a motion in arrest of judgment will be allowed only for some fatal error or defect on the face of the record.

STATE v. McKNIGHT, 196 N. C. 259, 145 S. E. 281;
STATE v. BROWN, 218 N. C. 415, 11 S. E. 2d 321;
STATE v. BRYANT, 237 N. C. 437, 75 S. E. 2d 107.

The Appellants could easily have raised any federal questions they desired by introducing the record of the Federal Court into evidence into the trial of this case and by asking for special instructions to the jury. If the Appellants wish to raise the question as to whether or not they were relieved from the application of the statute because of privileges and immunities claimed under the Federal Constitution, they could have asserted and dictated these contentions into the Record under the general issue of Not Guilty and asked for a ruling of the trial judge in addition to any special instructions on these points. Having elected to stake all on an asserted estoppel resulting from the federal proceeding and having failed to properly present this to the Court and obtain a ruling thereon, we think the case of PENNSYLVANIA R. CO. v. ILLINOIS BRICK CO., 297 U. S. 447, 80 L. ed. 797, is in point, where this Court said:

"Plainly that was not enough. The Illinois statute requires that in cases involving construction of the Federal Constitution appeals from circuit courts shall be taken directly to the supreme court. And, as definitely shown by its decisions, that court will not take jurisdiction unless it appears from the record that the constitutional question was urged in the lower court, the ruling on it preserved in the record and the error assigned on appeal. While the order of that court transferring the case does not specify the grounds on which it was based, the petitioner states that the supreme court necessarily held the constitutional questions had not been properly raised and that, on the oral argument, the chief justice stated that the transfer would be made because of petitioner's failure properly to raise and preserve the constitutional questions. The appellate court so understood the grounds and effect of the order and held that by transferring the case the supreme court eliminated the constitutional ques-

> tions. As the highest court of the State declined to consider them because not raised in the circuit court or presented to it in accordance with practice that unquestionably was well established and reasonable, this court is without jurisdiction to consider either of them. Chicago, I. & L. R. Co. v. McGuire, 196 U. S. 128, 131, 49 L. ed. 413, 415, 25 S. Ct. 200; Hulbert v. Chicago, 202 U. S. 275, 50 L. ed. 1026, 26 S. Ct. 617; Cox v. Texas, 202 U. S. 446, 452, 50 L. ed. 1099, 1102, 26 S. Ct. 671; Louisville & N. R. Co. v. Woodford, 234 U. S. 46, 51, 58 L. ed. 1202, 1207, 34 S. Ct. 739."

Likewise, in BARBOUR v. GEORGIA, 249 U. S. 454, 63 L. ed. 704, Mr. Justice Brandeis, writing for this Court on a similar point, said:

> "The defendant raised, in his amended motion for a new trial, the further objection that the law was unconstitutional as applied to him, because the liquor had been acquired before the statute was enacted; but the trial judge denied the motion and declined to approve any of the grounds on which it was based. In accordance with the state practice its supreme court therefore refused to consider the point. Dickens v. State, 137 Ga. 523, 73 S. E. 826; Harris v. State, 120 Ga. 196, 197, 47 S. E. 573. Consequently the question is not before us (Louisville & N. R. Co. v. Woodford, 234 U. S. 46, 51, 58 L. ed. 1202, 1207, 34 Sup. Ct. Rep. 739), and on it we express no opinion."

We again call the attention of the Court to the fact that the Appellants' whole argument shows that they have not really attacked the validity of the statute but the authority exercised under the statute, and, therefore, we say that no appeal lies to this Court under 28 USC sec. 1257-(2) because this Court said in WILSON v. COOK, 327 U. S. 474, 90 L. ed. 793:

> "For 'the mere objection to an exercise of authority under a statute whose validity is not attacked cannot be made the basis' of an appeal."

VI

THE SUPREME COURT OF NORTH CAROLINA DECIDED THIS CASE ON AN INDEPENDENT NON-FEDERAL GROUND SUFFICIENTLY ADEQUATE TO

SUPPORT THE STATE COURT JUDGMENT AND UPON A NON-FEDERAL GROUND THAT IS TENABLE.

The Supreme Court of North Carolina having decided that no federal question was properly presented before the trial court and that the effect of the federal judgment and findings of fact was not presented according to State practice, the decision rests upon a non-federal ground which is independent and adequately supports the State judgment.

BEREA COLLEGE v. KENTUCKY, 211 U. S. 53, 53 L. ed. 81;

FOX FILM CORP. v. MULLER, 296 U. S. 207, 210, 80 L. ed. 158;

HERB v. PITCAIRN, 324 U. S. 117, 125-126, 89 L. ed. 789.

The fact that federal cases were cited and discussed in the opinion of the Supreme Court does not necessarily mean that that Court passed upon any federal questions. On this point in BLACK v. CUTTER LABORATORIES, 351 U. S. 292, 100 L. ed. 1188, this Court said:

> "The majority opinion of the Supreme Court of California contains broad statements to the effect that specific performance of the arbitration award would violate the public policy of the State. Petitioner's constitutional arguments are based on the belief that these statements establish the ground on which the judgment below was based, and that therefore the decision below not only establishes a conclusive presumption of advocacy of violence from the mere fact of membership in the Communist Party, but renders unenforceable substantially all contracts entered into by members of the Party.
>
> "This Court, however, reviews judgments, not statements in opinions. Herb v. Pitcairn, 324 U. S. 117, 125, 126, 89 L. ed. 789, 794, 795, 65 S. Ct. 459; Morrison v. Watson, 154 U. S. 111, 115, 38 L. ed. 927, 929, 14 S. Ct. 995. See also Williams v. Norros (US) 12 Wheat 117, 118, 120, 6 L. ed. 571, 572. At times, the atmosphere in which an opinion is written may become so surcharged that unnecessarily broad statements are made. In such a case,

it is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests. This means no more than that we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds. Herb v. Pitcairn, (US) supra; Williams v. Kaiser, 323 U. S. 471, 477, 89 L. ed. 398, 403, 65 S. Ct. 363."

The Supreme Court of North Carolina did not apply any rule in this case that it had not applied before. For example: In LANE v. SOUTHERN RY. CO., 192 N. C. 287, 293, 134 S. E. 865, the counsel for the defendant offered a deposition in evidence whereupon counsel for the plaintiff stated to the Court that they would object to such portions of the deposition as contradicted the allegations of defendant's answer. The Court then stated that it "would exclude all portions of the deposition tending to prove contributory negligence and which were in contradiction of defendant's pleadings." The defendant excepted to this statement of the Court and did not thereafter offer to read to the Court or to the jury any part of the deposition. In disposing of the matter and in holding that no ruling of the Court was presented by the assignment of error, the Supreme Court of North Carolina said:

"The general statement of the court, before defendant had read, or offered to read the deposition or any part of it, is not such a ruling upon the competency of evidence at the trial as may be made the ground of an exception. In order that an exception may be made the basis for an assignment of error, on appeal, it must be duly taken to a specific and definite ruling by the court upon a matter of law relative to the subject-matter of the controversy between the parties. After the statement by the court, defendant did not read or offer to read the deposition. The court therefore did not rule upon any specific testimony contained in the deposition; no ruling of the court upon the admissibility or competency of testimony offered by defendant as evidence upon the trial is presented by the assignment of error. Plaintiff did not object generally to the deposition; he objected only to such portions as might tend to contradict defendant's allegations with respect to contributory negligence. *Phillips v. Land Co.*, 174 N. C. 542; *Smith v. McGregor*, 96 N. C. 111."

We realize in determining the question of adequacy that this Court applies its own standards and judgment (BROAD RIVER POWER CO. v. SOUTH CAROLINA ex rel DANIEL, 281 U. S. 537, 540, 74 L. ed. 1023) but we submit that the decision of the North Carolina Supreme Court is in line with all of the authorities which support the use of State practice in the presentation of questions and that the basis of the decision is an independent matter (MINNESOTA v. NATIONAL TEA CO., 309 U. S. 551, 556, 84 L. ed. 920). We do not believe that it can be contended that the non-federal ground of this decision is a mere pretext or cloak to evade the decision of federal questions. If it should be thought that federal questions have been decided, then it is believed that the non-federal ground is adequate to support the judgment (ENTERPRISE IRRIG. DIST. v. FARMERS' MUT. CANAL CO., 243 U. S. 157, 163-4, 61 L. ed. 644).

CONCLUSION

The Appellee, State of North Carolina, contends that this appeal should be dismissed and the judgment below affirmed. Contrary to the Appellants' contention the Supreme Court of North Carolina has never at any time changed its interpretation of the Trespass Statute involved, and even if it had this would not be any ground for the assertion of a constitutional question (CAROLINA-VIRGINIA RACING ASSOCIATION v. CAHOON, ET ALS., 214 F. 2d 830, and cases cited; BRINKERHOFF-FARRIS TRUST & SAVINGS CO. v. HILL, 281 U. S. 673, 74 L. ed. 1107). The Constitution of the United States does not guarantee that the decisions of State courts shall be free from error or require that their pronouncements shall be consistent (WORCESTER COUNTY TRUST CO. v. RILEY, 302 U. S. 292, 82 L. ed. 268).

Where the proceedings of the State Court were conducted under the ordinary forms of criminal prosecution there is no denial of due process of law (MILLER v. TEXAS, 153 U. S. 535, 38 L. ed. 812).

The question of former jeopardy was not sufficiently raised

by Appellants under the State practice, and if it had been sufficiently presented under all the decisions the question is not substantial and is not of sufficient importance to warrant consideration by the United States Supreme Court. If such a question had been deemed to be substantial by this Court it would not have denied the Petition for Certiorari in STATE v. HICKS, 233 N. C. 511, 64 S. E. 2d 871, cert. den. 342 U. S. 381, 96 L. ed. 629.

The truth of the whole matter is that the Appellants staked their whole case on the effect of the Federal Court decision (SIMKINS v. CITY OF GREENSBORO, 149 F. Supp. 562, Affirmed CITY OF GREENSBORO v. SIMKINS, 246 F. 2d 425) and when this was not properly presented and was not passed upon by the Supreme Court of North Carolina the appeal of the Appellants should be dismissed.

Respectfully submitted,

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Attorney General of North Carolina

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Counsel for the State of North Carolina,
Appellee.

Justice Bldg.
Raleigh, N. C.

FILE COPY

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JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

NO. [redacted]

PHILLIP COOKE, LEON WOLFE, GEORGE SIMKINS, JR., JOSEPH STURDIVENT, SAMUEL MURRAY, and ELIJAH H. HERRING, Appellants

vs.

STATE OF NORTH CAROLINA

Appeal from the Supreme Court of the State of North Carolina

BRIEF OPPOSING MOTION TO DISMISS

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 466

Phillip Cooke, Leon Wolfe, George Simkins, Jr.,
Joseph Sturdivent, Samuel Murray, and Elijah H. Herring

Appellants

v

State of North Carolina

Appeal from the Supreme Court of the State of North Carolina

BRIEF OPPOSING MOTION TO DISMISS

The above named appellants respectfully file this, their **Brief Opposing the Motion to Dismiss,** which motion has been filed herein by appellee, State of North Carolina.

Corrections In Statement of the Case

(a) Appellee says in its Statement of the Case (Page 4 of Motion to Dismiss): "The Court will further note that the State of North Carolina **was in no manner made a party to this civil action in the Federal Court.**" (Emphasis added.) Appellants believe that this is an incorrect statement of both fact and law.

The State of North Carolina was a party to the Federal Court proceedings in the only constitutional sense that it could have been a party to those proceedings. In the recent case of **Cooper v Aaron** (Decided September 29, 1958) ____ US ____ 3 L ed 2d 5, 16, this Court said:

"The command of the Fourteenth Amendment is that no 'State' shall deny to any person within its jurisdiction the equal protection of the laws. 'A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government . . . denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning.' Ex parte Virginia, 100 US 339, 347, 25 L ed 676, 679."

Indeed, it is now almost a truism in the decisions of this Court that the State of North Carolina was a necessary party in the constitutional sense, and that action by the State of North Carolina was a necessary factor to give the Federal Courts jurisdiction in **Simkins v Greensboro** to declare the "constitutional rights" of appellants under the Fourteenth Amendment and to find that the State of North Carolina had constitutionally violated those "constitutional rights." In **Shelley v Kraemer**, 334 US 1, 13, 92 L ed 1161, 1180, 68 S Ct 836, this Court said:

"Since the decision of this Court in the Civil Rights Cases, 109 US 3, 27 L ed 835, 3 S Ct 18 (1883), the principle has become firmly imbedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

It was therefore necessary for appellants to bring the State and its actions before the Federal Courts in order to show that the "constitutional rights" of appellants under the Fourteenth Amendment had been violated by the State, and that appellants were entitled to relief against such State action.

That the Federal Courts found that the State of North Carolina was a party in the only constitutional sense in which

it could have been a party and that there was wrongful action by the State in denying the "constitutional rights" of appellants can be clearly seen from the Federal Court proceedings. (See Statement as to Jurisdiction, Pages 10-16, 67-79.)*

It would indeed be anomalous if the State of North Carolina could be heard to say in effect in this case: "It is true that the State of North Carolina has violated the 'constitutional rights' of the appellants under the 14th Amendment. It is true that this State violation of appellants' 'constitutional rights' has been duly established by Declaratory Judgment of the United States District Court for the Middle District of North Carolina, duly affirmed by the Court of Appeals for the Fourth Circuit. It is true that the State's agencies were the defendants in that Declaratory Judgment and that their unlawful actions were held to be the unlawful actions of the State of North Carolina. But the State of North Carolina knows nothing about any of this on the ground that it was not by name a party to the Declaratory Judgment, and is therefore free to prosecute and punish appellants as criminals for exercising those very 'constitutional rights' which the Federal Courts have held were 'unlawfully denied' the appellants by the State of North Carolina."

(b) For some reason appellee ignores in its Statement of the Case the written Motion to Set Aside the Verdict filed by appellants in the trial court, which motion was not answered or denied by appellee, and which motion set out at length fundamental Federal rights of appellants which appellants alleged were being violated, which motion the trial court denied and which action of the trial court the Supreme Court of North Carolina used more than three printed pages (See Pages 50-53 of Statement as to Jurisdiction), in upholding as containing "no error."

Appellants believe that this pleading is a crucial part of this case, and does not deserve to be omitted from any Statement of the Case.

*See Note, Bottom Page 23.

ARGUMENT

I

Appellee's first argument in its Motion to Dismiss (Page 5) is:

"The Question of Racial Discrimination in the Use of the Golf Course Was Not Involved in This Case."

The only way such a contention can be made is:

(1) To ignore the Opinion of the United States District Court for the Middle District of North Carolina in **Simkins et al. v. City of Greensboro et al.,** (See Pages 10-16 of Statement as to Jurisdiction), which Opinion the Supreme Court of North Carolina said in its Opinion in this case was before the State Courts: **"Our knowledge of the facts in that case is limited to what appears in the published opinion."** (Page 50 of Statement as to Jurisdiction.) The Federal Court's Opinion shows abundantly that the question of racial discrimination was very much involved.

(2) To ignore appellants' Motion to Quash (See Pages 17-19 of Statement as to Jurisdiction) and Motion to Set Aside the Verdict (See Pages 20-25 of Statement as to Jurisdiction), which motions alleged in detail how the question of racial discrimination was involved, and which Motion to Set Aside the Verdict alleged verbatim the Declaratory Judgment of the Federal District Court as follows:

"It is now ordered, adjudged and decreed that defendants have unlawfully denied the plaintiffs as residents of the City of Greensboro, North Carolina, the privileges of using the Gillespie Park Golf Course, and that this was done solely because of the race and color of the plaintiffs, and constitutes a denial of their constitutional rights, and unless restrained will continue to deny plaintiffs and others similarly situated." (See Page 92 of Transcript of Record.)

(3) To ignore the testimony of one of appellee's chief witnesses upon the trial of this case. Clyde Bass, the Golf Assistant Pro in charge at the time involved, testified (See Page

41 of Transcript of Record): "To my knowledge, no Negroes have ever played at Gillespie Park Golf Course before this date. Some Negroes have presented themselves before this date to play, but none have played to my knowledge."

But the immediate question in this case is whether or not this Court has jurisdiction to examine the record to see whether or not the question of racial discrimination was involved. As sustaining this Court's jurisdiction to see whether or not the record shows racial discrimination, appellants quote from **Eubanks v Louisiana**, 356 US 584, 2 L ed 2d 991, 994, 78 S Ct 970, as follows:

"We are reluctantly forced to conclude that the uniform and long-continued exclusion of Negroes from grand juries shown by this record cannot be attributed to chance, to accident, or to the fact that no sufficiently qualified Negroes have ever been included in the lists submitted to the various local judges."

As to this Court's jurisdiction to review jury verdicts where Federal rights are involved, appellants quote from **Niemotko v Maryland**, 340 US 268, 271, 95 L ed 267, 270, 71 S Ct 325, 327, as follows:

"It is quite apparent that any disorderly conduct which the jury found must have been based on the fact that appellants were using the park without a permit, although, as we have indicated above, there is no statute or ordinance prohibiting or regulating the use of the park without a permit."

Appellee says under this argument that, "The Appellants were excluded from the golf course, not because of any racial reasons . . ."

The United States District Court said in its Opinion, which the Supreme Court of North Carolina said was before the State Courts, the following:

"The evidence does clearly show that white people were allowed to play by paying the greens fees without any questions and without being members. When Negroes asked to play, they were told that they would have to be members

before they could play and it clearly appears that there was no intention of permitting a Negro to be a member or to allow him to play, solely because of his being a Negro.

"The six plaintiffs presented themselves at the desk of the man in charge of the golf course and laid down 75 cents each and asked to play, the first named plaintiff being a dentist and practicing his profession in Greensboro. But they were not given permission to play. They insisted on their right to play and played three holes. While playing the third hole, the manager came and ordered them to leave, and they refused to go unless an officer arrested them. Whereupon the manager swore out a warrant charging each with trespass upon which they were tried, convicted and sentenced to 30 days in jail, the Statutory limit, from which an appeal is pending in the Supreme Court of North Carolina.

"The Negroes have not only been denied the privilege of the golf course, but there is no intention on the part of the defendants to permit them to do so unless they are compelled by order of court." (See Pages 11-12 of Statement as to Jurisdiction.)

Judge Johnson J. Hayes, who wrote those words, until he retired not long ago, had been for more than thirty years the only Federal Judge of the Middle District of North Carolina. He is a native of North Carolina and has lived in the State all his life. Appellants believe that some more compelling reason than any appearing in appellee's Motion to Dismiss, is necessary to support the suggestion that this assertion of appellee or even the finding of the State's Jury, should have higher standing than the Opinion of this distinguished Federal Jurist, whose long and intimate acquaintance with the local scene, gave him special competence to declare the facts and the law touching the Federal "constitutional rights" involved in this case.

Jurisdictional Question Still Foremost

While the jurisdictional question is still foremost as to whether or not this Court has jurisdiction to look into the record to determine whether or not there has been racial discrimina-

tion, since appellee has made this flat assertion that no racial discrimination was involved, appellants feel that it is not improper for them to suggest that, if the merits should be reached in this case, appellants are confident that they can show by materials which this Court will have authority to consider, not only that the Federal District Court spoke the truth when it said in its Opinion: **"Although the golf course has been available to the public for many years, whether by design or otherwise, Negroes have been denied the enjoyment of the privilege."** (See Page 10 of Statement as to Jurisdiction.) But appellants are also confident that they can show by such materials that on the night before the injunction of the Federal District Court was to take effect putting an end to racial discrimination at the golf course, the Club House mysteriously burned and immediately thereafter the City Council of Greensboro passed a resolution (contrary to its agreement with the Federal Government **"that the City of Greensboro would maintain and operate said golf course for the use and benefit of the public during the useful life of said golf course,"**—See No. 20, Page 71 of the Statement as to Jurisdiction), which resolution closed the golf course rather than obey the injunction of the Federal District Court against racial discrimination, and that the golf course has remained closed ever since to this very day.

The truth is that in all of the years of the operation of this golf course, built originally with 65 per cent of Federal funds, the only Negroes who have ever played on it were these appellants in this case, and for thus exercising their "constitutional rights" under the Federal Constitution, which rights have been declared to exist by the Federal Courts for North Carolina, these appellants will pay with jail sentences unless this Court intervenes.

I-A

Appellants believe that this Court has jurisdiction to determine whether or not the springe set by the State agencies to exclude Negro golfers in this case was so broad as to run afoul of the 14th Amendment without regard to the question of racial discrimination.

This Court is not unfamiliar with schemes, "whether attempted 'ingeniously or ingenuously' " (See **Cooper v Aaron**, supra), to circumvent the desegregation decisions of this Court. But in this case, apparently in an effort to be letter-perfect, there is a serious and substantial question as to whether or not the scheme here devised went so far that it offends the 14th Amendment, putting the question of race to one side.

It must be kept in mind that this was a public golf course, built with public funds, 65 per cent of the original cost coming from the Federal treasury. Under these circumstances, what was the scheme set up by the appellee's State agencies for this golf course? It comes unabashedly from the appellee's key witnesses in this case.

The Golf Assistant Pro, Clyde Bass, who was in charge when appellants sought to play golf, said he told appellants: **"I told them it was a private club for members and invited guests only."** (See Page 40 of Transcript of Record.)

The president of the appellee's State agency golf corporation almost boasted: **"The City had no voice in the operation of the golf course after the corporation took it up. We set up our own rules, we hired our own people. We paid the insurance for the various employees that we had. We operated completely on our own. The City had nothing whatever to do with it."** (See Page 74 of Transcript of Record.)

This same witness testified before the United States District Court. (See Page 77 of the Transcript of Record.) Here is what Judge Hayes said about what the City had to do with the golf course "after the corporation took it up":

"The facts show that the City is still 'in the saddle' so far as real control of the park is concerned and that the so-called lease can be disregarded, if and when, the City decides to do it. It also lends powerful weight to the inference that the lease was resorted to in the first instance to evade the City's duty not to discriminate against any of its citizens in the enjoyment in the use of the park." (See Page 14 of Statement as to Jurisdiction.)

Although only Negroes were ever made the victims of this

arbitrary delegation of the State's power, undoubtedly the delegation of power was broad enough in its terms to refuse membership in this "private club" to any citizen, including white citizens, and it is this very arbitrary power to operate "on our own" and to make "a private club" out of a public golf course, which brings this case within the type of situation which this Court held it had jurisdiction to review in **Niemotko v Maryland**, supra. There the Court said:

"This Court has many times examined the licensing systems by which local bodies regulate the use of their parks and public places . . . In those cases this Court condemned statutes and ordinances which required that permits be obtained from local officials as a prerequisite to the use of public places, on the grounds that a license requirement constituted a prior restraint on freedom of speech, press and religion, and, in the absence of narrowly drawn, reasonable and definite standards for the officials to follow, must be invalid."

Concurring, Mr. Justice Frankfurter said (See 95 L ed 278):

"The vice to be guarded against is arbitrary action by officials. The fact that in a particular instance an action appears not arbitrary does not save the validity of the authority under which the action was taken."

II

Appellee's second argument in its Motion to Dismiss (Page 10) reads:

"The Appellants Did Not Properly Present Any Constitutional Question Relating to the Effect of the Findings of Fact and Judgment of the Federal Court."

Appellants raised this and other Federal questions in pleadings, namely, a written Motion to Quash (See Pages 28-32 of Transcript of Record) and a written Motion to Set Aside the Verdict (See Pages 91-97 of Transcript of Record.)

The rule in such a situation was recently restated by this Court in **Staub v City of Baxley**, 355 US 313, 2 L ed 2d 302, 309, 78 S Ct 277, as follows:

"Whether a pleading sets up a sufficient right of action or defense grounded on the Constitution or a law of the United States, is necessarily a question of federal law; and where a case coming from a state court presents that question, this Court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court."

Although appellants quoted more at length from **Staub** (Pages 33-34 of the Statement as to Jurisdiction), appellee does not even mention the **Staub** case or the principles which govern under the decisions of this Court when Federal rights are asserted in pleadings.

In **Staub** this Court not only held that the sufficiency of such allegations **"is necessarily a question of federal law,"** but this Court also stated two other propositions in **Staub:**

(a) **". . . this Court must determine for itself the sufficiency of the allegations displaying the right or defense . . ."**

(b) That in such a situation it is within this Court's **"province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect . . ."**

It is true that, so far as the Motion to Quash is concerned, the North Carolina Supreme Court said that the Federal **"right or defense"** required evidence "aliunde the record," which was not permissible under State practice. But appellants say:

(a) That under **Staub** this determination was one of **"a question of federal law"** which this Court has jurisdiction to review, especially since under State practice other Federal rights may be asserted under a motion to quash (See **State v Perry**, 248 NC 334, 103 SE 2d 404), thus discriminating as between Federal rights (See **Williams v Georgia**, 349 US 375, 99 L ed 1161, 75 S Ct 814.)

(b) Since appellee did not answer to deny the allegations of the Motion to Quash, no evidence was necessary and the allegations should have been taken as true as appearing on the face of the record. See **Tomkins v Missouri**, 323 US 485, 89 L ed 407, 65 S Ct 370.

Motion to Set Aside Verdict Was Decided on the Merits.

While all that has been said above concerning the Motion to Quash applies equally to the Motion to Set Aside the Verdict, the latter motion was decided on the merits, the Supreme Court of North Carolina using more than three printed pages in doing so. (See Pages 50-53 of the Statement as to Jurisdiction.) There is not the slightest suggestion anywhere in the State Court's Opinion that the Motion to Set Aside the Verdict was denied on any ground of State practice or procedure. Curiously enough, appellee does not quote anything from the State Court's Opinion which even appellee claims to sustain its contention in this regard.

Under this argument appellee also says the following with regard to the contention of appellants that the Federal Constitution, including the Supremacy Clause, required the State Courts to notice and give effect to the Federal Court's determinations in the **Simkins** case (See Page 13 of the Motion to Dismiss): "(1) In their Motion to Quash, the Appellants said they would introduce the Record in evidence, and (2) The trial court was never asked to pass upon the question of judicial notice."

As to No. (1), both the Motion to Quash and the Motion to Set Aside the Verdict said the following, instead of what appellee says (See Page 18 of Statement as to Jurisdiction.):

"(c) These defendants have subpoenaed the Clerk of the United States District Court for the Middle District of North Carolina to bring to this trial the full record and judgment roll in said case and respectfully request an opportunity to offer this evidence upon the hearing of this motion."

The trial court denied each motion summarily without requiring the State to answer and without giving appellants the requested **"opportunity to offer this evidence upon the hearing of this motion."** (See Page 43 of Statement as to Jurisdiction and Page 97 of the Transcript of Record.)

As to No. (2) appellants say that they did ask the trial court "to take judicial notice" and "to give effect to" the Federal proceedings, (See Pages 92-93 of Transcript of Record.), and:

(a) Appellants in their Motion to Set Aside the Verdict set out verbatim the following from the Federal Court records: The Declaratory Judgment and Findings of Fact No. 33 and No. 30. The Supreme Court of North Carolina says in its Opinion that the Opinion of the Federal Court was before the trial court. It was thus not necessary to ask the trial court to take judicial notice of records alleged verbatim and not denied by appellee in any way, or of the Federal Court's Opinion, which the State Supreme Court said was before the trial court.

(b) In **Lilly v Grand Trunk Western Railroad Co.,** 317 US 481, 488, 87 L ed 411, 416, 63 S Ct 347, a similar contention was made and answered by this Court as indicated in the following quotation:

"Respondent insists that reliance cannot be placed on Rule 153 because it was not called to the attention of the trial court or the jury and its injection now would involve deciding the case on issues not submitted to the jury. We do not regard this point as well taken. No claim is advanced that the rule is invalid, and we see no reason for questioning it. Adopted in the exercise of the Commission's authority, Rule 153 acquires the force of law and becomes an integral part of the Act . . ., to be judicially noticed."

(c) Appellants believe that the determinations of the Federal Courts interpreting the 14th Amendment and establishing the "constitutional rights" of appellants under that Amendment, likewise became an integral part of Federal law, **"to be judicially noticed."** In **Cooper v Aaron,** supra, quoting from Chief Justice Marshall, this Court said: " 'If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, **and destroy the rights acquired under those judgments,** the constitution itself becomes a solemn mockery . . . . . ' " (Emphasis added.)

III

Appellee's third argument (Page 14 of Motion to Dismiss) reads:

"There Is No Substantial Question As to Former Jeopardy."

The question of double jeopardy was raised by appellants

in both their Motion to Quash and their Motion to Set Aside the Verdict. The Supreme Court of North Carolina clearly decided the question on the merits as follows: **"It is manifest there is here no double jeopardy."** (See Page 44 of Statement as to Jurisdiction.)

Certainly, as appellants believe, where the State has instituted three successive criminal proceedings against six Negroes for playing on a public golf course under circumstances which the Federal Courts for North Carolina have held represented their "constitutional rights" to play and have held further that the State has "unlawfully denied" these "constitutional rights," the claim of double jeopardy under the Federal Constitution cannot be said to be so unsubstantial as to deprive this Court of jurisdiction to hear the claim of double jeopardy on the merits.

In **Hoag v New Jersey,** 356 US 464, 2 L ed 2d 913, 918, 78 S Ct 829, it is said: **"In the last analysis, a determination whether an impermissible use of multiple trials has taken place cannot be based on any overall formula."** It was also said (2 L ed 2d 917): **"The question in any given case is whether such a course has led to fundamental unfairness."** One test referred to by Mr. Justice Harlan for the Court was **"unduly harassing an accused."**

In his concurring opinion in **Brock v North Carolina,** 344 US 424, 429, 97 L ed 456, 460, 73 S Ct 349, Mr. Justice Frankfurter indicated a test of double jeopardy as conducting successive trials **"merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time."**

Appellants believe that under the facts and circumstances of this case the three successive criminal proceedings against them for the same alleged offense present very serious questions of **"fundamental unfairness"** and of **"unduly harassing"** them for and in the exercise of their "constitutional rights." Appellants also believe that, if this case should reach the merits, a serious question will be presented as to whether or not these multiple criminal proceedings took place because the prosecutor was "incompetent or casual or even ineffective"

in presenting the first two sets of criminal proceedings which failed in the State Courts.

The basic philosophy of double jeopardy was stated for the Court by Mr. Justice Black in **Green v United States**, 355 US 184, 2 L ed 2d 199, 204, 78 S Ct 221, as follows:

"The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

IV

The appellee's fourth argument and its first sentence under that argument (Page 18 of Motion to Dismiss) read as follows:

"The Effect of the Supremacy Clause of the United States Constitution."

"The Appellants contend that under Article VI, Clause 2, of the Federal Constitution, the Supreme Court of North Carolina was bound to recognize the federal cases dealing with golf courses, and when this is done Appellants should be declared Not Guilty."

Appellants contend no such thing. What they do contend, among other things, is:

First. That they alleged in their Motion to Set Aside the Verdict the following (See Page 92 of Transcript of Record):

"II. That the Supremacy Clause (Article VI) of the Constitution of the United States requires this Court to give effect to and to enforce the judgments of the United States Courts covering the subject matter of this prosecution, particularly the 'Decree and Injunction' of the United States District Court for the Middle District of North Carolina, in Civil Case No. 1058, in which these defendants were plaintiffs and Gillespie Park Golf Club, Inc., was one of the defendants, covering the identi-

cal acts and conduct charged by the State to be a crime of trespass in this case, said 'Decree and Injunction' reading in part as follows:

"It is now ordered, adjudged and decreed that defendants have unlawfully denied the plaintiffs as residents of the City of Greensboro, North Carolina, the privileges of using the Gillespie Park Golf Course, and that this was done solely because of the race and color of the plaintiffs, and constitutes a denial of their constitutional rights, and unless restrained will continue to deny plaintiffs and others similarly situated."

That appellants further alleged in said Motion to Set Aside the Verdict that the United States District Court for the Middle District of North Carolina had specifically found in its Finding of Fact No. 30 that Gillespie Park Golf Club, Inc. was an agency of appellee State of North Carolina, said Finding reading on this point (See Page 96 of Transcript of Record) **"that under these circumstances said corporation was in fact an agency of the City and the school board for the continued maintenance and operation of the golf course for the convenience of the citizens of Greensboro."**

Second. That appellee State of North Carolina did not answer and did not in any way deny or controvert the allegations of the Motion to Set Aside the Verdict, and that said allegations must therefore be taken as true. (See **Tomkins v Missouri,** supra.)

Third. That appellants further alleged in their Motion to Set Aside the Verdict that to permit the verdict to stand **"would violate the rights of these defendants under the Constitution and laws of the United States, including the due process and equal protection clauses of the 14th Amendment."**

Fourth. That the trial court summarily denied the Motion to Set Aside the Verdict without requiring the appellee State to answer the allegations (See Page 97 of Transcript of Record), and that the Supreme Court of North Carolina used more than three printed pages in upholding this denial of the motion on its merits. (See Pages 50-53 of Statement as to Jurisdiction.)

Fifth. That the Supreme Court of North Carolina closed its

lengthy discussion of the Motion to Set Aside the Verdict with these significant words: **"Defendants were not, as a matter of right, entitled to have the verdict set aside."** (See Page 53 of Statement as to Jurisdiction.)

Appellants respectfully submit that these words of the Supreme Court of North Carolina can mean only that the uncontroverted allegations of the Motion to Set Aside the Verdict were insufficient to establish the Federal "right or defense" alleged, and that since under **Staub v City of Baxley,** supra, **"the sufficiency of the allegations displaying the right or defense" "is necessarily a question of federal law,"** the Supreme Court of North Carolina has here clearly decided the Federal questions raised by the Motion to Set Aside the Verdict on their merits.

For, since under **Staub "this Court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court,"** if this Court on its independent appraisal of the allegations should determine them to be sufficient, when uncontroverted as here, to establish "the right or defense" alleged, then appellants **would be** entitled as a matter of right to have the verdict set aside, contrary to the holding by the North Carolina Supreme Court that appellants "were not, as a matter of right, entitled to have the verdict set aside."

V.

Appellee's fifth argument (Page 20 of Motion to Dismiss) reads:

"Appellants Are Required to Present Federal Questions in State Courts According to State Practice."

Appellee seems completely to overlook the other principle, stated by Mr. Justice Holmes in **Davis v Weschler,** 263 US 22, 24, 68 L ed 143, 145, 44 S Ct 13, and recently restated for the Court by Mr. Justice Whittaker in **Staub v City of Baxley,** supra: **" 'Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.' "**

Besides, appellee does not quote a single word from the Opinion of the Supreme Court of North Carolina in this case which even suggests that the Federal questions raised by appellants in their Motion to Set Aside the Verdict were not **"plainly and reasonably made,"** or that they were improper under any rules of State practice. The truth of the matter is that there is no such word in the North Carolina Supreme Court's lengthy discussion of the Motion to Set Aside the Verdict.

Curiously, appellee under this argument talks about **"a motion in arrest of judgment,"** which would have been **a motion made after the trial court had entered its judgment upon the verdict,** and cites some North Carolina cases which appellee says states the local rule applying to motions in arrest of judgment. But the short answer to this is that appellants made no such **motion in arrest of judgment,** but rather filed a written Motion to Set Aside the Verdict **before the trial court had entered judgment upon the verdict.**

Under this argument appellee also says that appellants **"have not really attacked the validity of the statute but the authority exercised under the statute; and, therefore, we say that no appeal lies to this Court under 28 USC sec. 1257 (2). . ."**

In both their Motion to Quash and their Motion to Set Aside the Verdict appellants alleged **"that GS 14-134 is hereby being unconstitutionally applied to these defendants"** (appellants here), for reasons under the Constitution of the United States which appellants set out in considerable detail in both motions. (See Pages 28 and 91 of Transcript of Record.)

When the State agencies of appellee **"unlawfully denied the plaintiffs** [appellants here] **as residents of the City of Greensboro, North Carolina, the privileges of using the Gillespie Park Golf Course . . . solely because of the race and color of the plaintiffs"** (appellants here), as duly determined by the United States District Court for the Middle District of North Carolina (See Page 92 of Transcript of Record), those State agencies were not exercising any authority under the criminal trespass statute (GS 14-134). Instead, they were exercising

powers of ownership and possession duly delegated to them by the appellee State.

The appellee then stepped in to vindicate and make good this unlawful interference with the "constitutional rights" of appellants by supporting the unlawful acts of its agencies with the criminal sanctions of this trespass statute (GS 14-134). It is this application of the criminal trespass statute (GS 14-134) which appellants alleged, and still contend, makes that statute unconstitutional as applied in this case.

This is exactly what happened in **Marsh v Alabama,** 326 US 501, 90 L ed 265, 66 S Ct 276; and that is why appellants believe that **Marsh** is a complete authority sustaining the jurisdiction of this Court to reach the merits in this case.

VI

Appellee's sixth argument (Page 24 of the Motion to Dismiss) reads:

"The Supreme Court of North Carolina Decided This Case on an Independent Non-Federal Ground Sufficiently Adequate to Support the State Court Judgment and Upon a Non-Federal Ground That Is Tenable."

Appellee does not take the trouble to state precisely what that independent and adequate non-Federal ground is, and does not quote a single word from the Opinion of the Supreme Court of North Carolina which purports to set forth that independent and adequate non-Federal ground.

The truth is that there is no word in the Opinion of the Supreme Court of North Carolina which even suggests that the Court's decision upholding the trial court's denial of the Motion to Set Aside the Verdict was based upon any non-Federal ground whatsoever. Instead, the North Carolina Supreme Court concluded its discussion of the Motion to Set Aside the Verdict with this statement: **"Defendants were not, as a matter of right, entitled to have the verdict set aside."** Since the Federal questions raised in the Motion to Set Aside the Verdict were presented in a written pleading, their sufficiency to establish appellants' right to have the verdict set aside because

in violation of the "constitutional rights" of appellants under the Constitution of the United States, under the **Staub** case, supra, was **"necessarily a question of federal law,"** and the decision of the State Court was thus necessarily the decision of **"a question of federal law."**

FINALLY

The Question of Offering the Records of the Federal Courts in Evidence.

At more than one place in its Motion to Dismiss, appellee emphasizes its contention that the records of the Federal Court proceedings in the **Simkins** case were not offered in evidence. (E. g. Pages 11 and 23). Appellants' answers are as follows:

1. As to the Opinion of the Federal District Court (149 Fed Supp 562), the Supreme Court of North Carolina conceded that this was before the State Courts, presumably on the basis of judicial notice. **"Our knowledge of the facts in that case is limited to what appears in the published opinion,"** the Court said. (See Page 50 of Statement as to Jurisdiction.)

Under these circumstances it would seem absurd to suggest that it was necessary to offer in evidence that Opinion of the Federal Court. It is reproduced on Pages 10-16 of the Statement as to Jurisdiction.

2. As to the Declaratory Judgment of the Federal District Court and two of its key Findings of Fact, namely, No. 33 and No. 30, these were alleged **verbatim** by appellants in their Motion to Set Aside the Verdict. (See Pages 92, 94, and 98, respectively, of the Transcript of Record.) The appellee did not deny or controvert or question the correctness in any way of these reproductions of the Declaratory Judgment and Findings of Fact No. 33 and No. 30.

Under these circumstances appellants believe that the Declaratory Judgment, Finding of Fact No. 33, and Finding of Fact No. 30 were before both the trial court and the Supreme Court of North Carolina as a matter of uncontroverted pleading. In this connection the rule stated in **Staub v City of Baxley**, supra, must be kept in mind at all times: **" 'Whether a pleading**

sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of Federal law, and where a case coming from a State Court presents that question, this Court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court.'"

3. As to the question of judicial notice of the judgment roll, as might become necessary for the State Courts to determine their duty with regard thereto under the Supremacy Clause of the Constitution of the United States (Article VI, Clause 2), appellants made the original papers in the **Simkins** case, in possession of the Deputy Clerk of the United States District Court for the Middle District of North Carolina, available to the trial court (Page 69 of Transcript of Record), and made available duly certified copies of the main records in the case for the convenience of the Supreme Court of North Carolina. (See Pages 182-184 of Transcript of Record.)

One type of material coming within the realm of judicial notice has been said to be that which **"is capable of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy."** (See Morgan, **"Judicial Notice,"** (1944) 57 Harvard Law Review 269, 286-87.) The original as well as duly certified copies of the records of the United States Courts would seem to meet this test of judicial notice.

Besides, the determinations of the Federal Courts in this case would seem to appellants to constitute a construction of the 14th Amendment and the establishment of and placing the imprimatur of that Amendment upon specific "constitutional rights" of appellants, comparable to what Mr. Justice Douglas said for the Court in **Railway Employes' Department etc. v Hanson**, 351 US 225, 232, 100 L ed 1112, 1130, 76 S Ct 714: **"A union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the federal law upon it and, by force of the Supremacy Clause of Article VI of the Constitution, could not be made illegal nor vitiated by any provision of the laws of a State."**

Even the Supreme Court of North Carolina, quoting from **25 Ruling Case Law, Sec. 209**, has heretofore held that, "In

construing a Federal statute, a state court is bound by the construction placed on it by the Federal courts." (See **Mangum v Atlantic Coast Line Railway,** 188 NC 689.)

It would seem that a fortiori, judicial notice should be taken of the construction placed upon the various provisions of the Constitution of the United States by the Federal Courts. In this case the Federal Courts for North Carolina had held prior to the drawing of the warrants involved in this case that the appellants had "constitutional rights" to perform the identical acts which appellee, State of North Carolina, charges to be a crime of trespass under its trespass statute, GS 14-134.

But the main point which appellants suggest here is that certainly these contentions with regard to judicial notice are not so unsubstantial as to deprive this Court of jurisdiction to consider them on the merits.

4. The simple truth is, moreover, that the Federal Records which it is said by appellee were not offered in evidence were in fact offered in evidence as "Defendants' Exhibits 6 and 7," and their admission was refused by the trial court.

On Page 77 of the Transcript of Record appears the following:

"EXCEPTION No. 22:

"Mrs. Kennedy: If your Honor please, we'd like, if possible, to have a ruling on whether or not these would be admissible.

"Court: I am going to sustain the objection as to those two Exhibits, that is No. 6 and No. 7.

"EXCEPTION No. 22."

Appellants attach hereto photographic reproductions of Pages 58 and 59, marked Appendix I and Appendix II, of the original "Transcript of Testimony" furnished to counsel for appellants in the State trial court by the Official Court Reporter in the trial of this case.

By some quirk of inadvertence the identification of the Federal Records as "Defendants' Exhibits 6 and 7", as shown by said Appendices, was omitted entirely from the record which went to the Supreme Court of North Carolina on appeal.

On Page 14 (Page 121 of Transcript of Record) of appellants' brief before the Supreme Court of North Carolina, the true fact was called to the attention of the Court by the following: "The Court erred in refusing to admit defendants' Exhibits 6 and 7, as set out in Exception No. 22. These exhibits were the decrees, the findings of fact, conclusions of law and opinion of the Federal District Court in the **Simkins** case and the opinion of the Court of Appeals, Fourth Circuit, in the same case."

Exercising its wide discretion to go outside the record for vital information concerning the true facts as to what transpired in the lower courts (See **Mason v Commissioners of Moore,** 229 NC 626, 627, 51 SE 2d 6, **and Aycock v Richardson,** 247 NC 234, 100 SE 2d 379.), the Supreme Court of North Carolina went outside the record (it could not be found in the record) to find, with reference to the records of the Federal Court proceedings, that **"the defendants had the record in that case identified. . . ."**

But by some quirk of inadvertence the Supreme Court of North Carolina failed to notice that the Federal Court records were identified as "Defendants' Exhibits 6 and 7," and therefore erroneously came to the conclusion that appellants did not offer these records in evidence.

In view of the North Carolina Supreme Court's wide discretion (See **Williams v Georgia,** supra.) to go beyond the record to get at the truth, appellants do not believe that, if offering these Federal Court records in evidence should become a material issue upon the question of jurisdiction, the above-mentioned quirks of inadvertence will render this Court powerless to reach the merits of this case. Appellants could not call this to the attention of the State Court because no petition for rehearing is permitted in a criminal case in the Supreme Court of North Carolina. (See **State v Council,** 129 NC 371 (511), 39 SE 814, and Certificate of the Clerk of the Supreme Court of North Carolina at the beginning of the Transcript of the Record.)

Nor do appellants believe that, if this case should reach oral argument, the representatives of appellee will tell this

Court that the true facts about offering the Federal Court records in evidence are other than as herein set forth. On the merits, if the case should reach the merits, appellee would also have an opportunity to say what "Defendants' Exhibits 6 and 7" were if they were not the Federal Court records.

Conclusion

Wherefore, appellants pray that this Court enter an order denying appellee's Motion to Dismiss, and noting probable jurisdiction in this case or, in the alternative, that consideration of the question of jurisdiction be postponed until a hearing of this case on the merits. Further, appellants pray that, if they should be mistaken in their belief that this Court has jurisdiction of this appeal under 28 USC 1257 (2), then that the appeal papers in that event be treated as a Petition for Certiorari under 28 USC 2103, and that such Petition be granted.

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Note: References to "Statement as to Jurisdiction" herein refer to Appellants' STATEMENT AS TO JURISDICTION filed in this case.

MR. MARSH: I have no further question.

MR. KONNEGAY: No questions.

WITNESS EXCUSED.

- - - - - - - - -

MRS. KENNEDY: Your Honor, the defendants would like now to introduce our exhibits into evidence.

THE COURT: Which ones?

MRS. KENNEDY: Exhibit 1, Exhibit 2, Exhibits 3, 4, and 5.

MR. KONNEGAY: OBJECTION.

THE COURT: OVERRULED.

(The exhibits previously marked for identification DEFENDANTS' EXHIBITS 1, 2, 3, 4, and 5, introduced in evidence.)

- - - - - - -

MYRTLE D. COBB, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MRS. KENNEDY:

Q Will you state your name and address, please?

A I am Myrtle D. Cobb. I am deputy clerk in the Federal Court in Greensboro.

Q As Deputy Clerk in the Federal Court here in Greensboro, is it part of your duty to keep public records?

A Yes, it is.

Q Do you have a record in the case of Simkins, et al, vs. Gillespie Park Golf Course, et al?

A This is the case. It is all the original papers that went up to the Court of Appeals that was filed in our office.

Q Were the findings of fact part of that record?

A Yes.

MRS. KENNEDY: Your Honor, at this time we'd like to offer into evidence a decree, the findings of fact, conclusions of law and opinion, as rendered by the Judge of the Federal Court, Middle District of Greensboro.

MR. KORNEGAY: OBJECTION.

THE COURT: Do you have anything further that you want to introduce in regard to that?

MRS. KENNEDY: In addition to that, we have the opinion of the Circuit Court of Appeals on this case.

MR. KORNEGAY: OBJECTION.

THE COURT: Let the record show that is being offered in evidence. I will rule on it later.

(The documents referred to were marked for identification DEFENDANTS' EXHIBITS 6 and 7.)

THE COURT: Anything else?

MRS. KENNEDY: Not with this witness, your Honor.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1959

NO. 7

LEON WOLFE, GEORGE SIMKINS, JR.
JOSEPH STURDIVENT, SAMUEL MURRAY,
and ELIJAH H. HERRING, Appellants

vs.

STATE OF NORTH CAROLINA

Appeal from the Supreme Court of the State of North Carolina

BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 7

Leon Wolfe, George Simkins, Jr.,
Joseph Sturdivent, Samuel Murray, and Elijah H. Herring

Appellants

v

State of North Carolina

Appeal from the Supreme Court of the State of North Carolina

BRIEF ON THE MERITS

This Court having, on January 12, 1959, entered an order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits (R 140), appellants file this Brief on the Merits pursuant to Rules 40 and 41 of the Revised Rules of this Court.

(a) Opinions in the Court Below

The Opinion of the Supreme Court of North Carolina delivered upon rendering the judgment here appealed from is reported in **State v Cooke et al., 248 NC 485, 103 SE 2d 846.** (R 107) That Court's Opinion upon a former trial upon another set of warrants charging the identical trespass upon the municipal Gillespie Park Golf Course is reported in **State v Cooke et al., 246 NC 518, 98 SE 2d 885.** (Page 55 of Appellants' Statement as to Jurisdiction)

(b) Grounds of Jurisdiction

This is a criminal prosecution commenced in the Municipal-County Court of Greensboro, North Carolina, alleging a

simple trespass by appellants upon the municipal Gillespie Park Golf Course. The warrants were issued under **Section 14-134 of the General Statutes of North Carolina (1953)**, which appellants contend is unconstitutional under the Federal Constitution as upheld and construed and applied in this case.

The Judgment of the Supreme Court of North Carolina appealed from was entered on June 4, 1958. (R 118) The sentence involved is 15 days in jail for each of appellants. (R 26-27)

No Petition for Rehearing in a criminal case is permitted in the Supreme Court of North Carolina. **State v Council, 129 NC 371 (511), 39 SE 814.** See also the Certificate of the Clerk of that Court. (R 139) Notice of Appeal to this Court was filed in the Supreme Court of North Carolina on August 27, 1958. (R 132) Appellants filed the Record and their Statement as to Jurisdiction and docketed the case in this Court on October 22, 1958, becoming No. 466 of the October Term, 1958.

Appellants believe that this Court has jurisdiction of this appeal under 28 USC 1257 (2). However, appellants have prayed in their Statement as to Jurisdiction and also in their Brief Opposing the Motion to Dismiss, and here renew that prayer, that if they should be mistaken in this belief, then that the appeal papers be treated as a Petition for Certiorari under 28 USC 2103 and that such Petition be granted.

(c) State Statute Involved

The validity under the Constitution of the United States of **Section 14-134 of the General Statutes of North Carolina (1953)**, as upheld and construed and applied by the State Courts to convict the appellants, is drawn in question upon this appeal, the Supreme Court of North Carolina having necessarily sustained said Statute's validity, said section reading:

> "If any person, after being forbidden to do so, shall go or enter upon the lands of another without a license therefor, he shall be guilty of a misdemeanor and on conviction shall be fined not exceeding fifty dollars or imprisoned not more than thirty days."

(c) Provisions of U. S. Constitution Involved

The provisions of the Constitution of the United States which appellants contend are offended by the above-quoted State statute, as upheld and construed and applied in this case, are the following:

Article VI, Second Paragraph

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Fourteenth Amendment, Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(d) Questions Presented by This Appeal

1. THE SUPREMACY CLAUSE QUESTIONS.

Is the State's criminal trespass statute (GS 14-134) unconstitutional "as applied"* in this case because:

(1) It seeks to implement the State's policy of making Gillespie Park Golf Course "a private club" (R 44, 75) in direct conflict with the policy of Federal law that this facility must provide "the greatest degree of public usefulness" (Manual of Rules and Regulations of W.P.A., Vol. II, Chap. 5, Page 1, Library of Congress Book No. HD 3881.A58)?

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*(See Raley v Ohio, ___US___, 3 L ed 2d 1344, 1353, ___S Ct___)

(2) It seeks to implement the State's effort to render ineffectual the agreement made by the State's agencies, City of Greensboro and Greensboro City Board of Education, with the United States, that during the useful life of this golf course it would be operated "for the use and benefit of the public" and would not "be leased, sold, donated, or otherwise disposed of to a private individual or corporation, or quasi-public corporation"? (See Fact No. 4, infra, and Appendixes 1(a), 1(b), and 1(c), Pages 80-82.)

(3) It seeks to implement the State's effort to make a crime of identical acts and conduct which Federal Courts held to be protected by the Constitution of the United States, and make lawful acts of the State's agencies which the Federal Courts have held to have been "unlawfully" committed against the "constitutional rights" of the appellants? (R 92)

II. THE FOURTEENTH AMENDMENT QUESTIONS

Is the State's criminal trespass statute (GS 14-134) unconstitutional "as applied"* in this case:

A. Under the Equal Protection Clause:

(1) Because it seeks to implement and make good the practice of racial discrimination against appellants by the State's agencies, as shown:

(a) By the "facts" in the "published opinion" of the United States District Court for the Middle District of North Carolina, which the Supreme Court of North Carolina said in its opinion in this case were before the State courts (R 115)? (b) By the Declaratory Judgment which was alleged verbatim in the Motion To Set Aside the Verdict (R 92) and which allegation was not controverted by the appellee State in any way? (c) Within the "rule of exclusion" established by the decisions of this Court **(e.g. Hernandez v Texas, 347 US 475, 480, 98 L ed 866, 871, 74 S Ct 667)?**

(2) Because a "lack of standards" in the permission-granting authority to play Gillespie Park Golf Course constitutes

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***(See Raley v Ohio, __US__, 3 L ed 2d 1344, 1353, __S Ct__)**

"a denial of equal protection" without regard to racial discrimination, within the meaning of such cases as **Niemotko v Maryland, 340 US 268, 273, 95 L ed 267, 271, 71 S Ct 325?**

B. Under the Due Process Clause:

(1) Because it seeks to implement a denial of due process to appellants in this case:

(a) In that the State rules which closed the mouths to the truth of certain key witnesses in this case violate the standards of justice and fundamental fairness which the Due Process Clause of the Fourteenth Amendment requires of States in criminal prosecutions?

(b) In that the Supreme Court of North Carolina for the very first time held in this case that this criminal trespass statute **(GS 14-134)** applies also to public lands, and not just to lands **"privately held" (State v Clyburn, 247 NC 455, 458, 101 SE 2d 295),** and the judgment here thus sends each of the appellants **"to jail for a crime he could not with reasonable certainty know he was committing" (Scull v Virginia,__ US __; 3 L ed 2d 865, 871, 79 S Ct 838)?**

(c) In that the multiple criminal proceedings against appellants in this case reach areas which the Due Process Clause forbids, such as **"fundamental unfairness"** or **"unduly harassing an accused" (Hoag v New Jersey, 356 US 464, 467, 2 L ed 2d 913, 917, 78 S Ct 829),** or **"merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time"** (Concurring Opinion in **Brock v North Carolina, 344 US 424, 429, 97 L ed 456, 460, 73 S Ct 349)?**

III. THE QUESTION OF JUDICIAL NOTICE

Insofar as this question should become important in this case, appellants believe that it may cut across both the Question of Jurisdiction and the Case on the Merits. Therefore, this Question of Judicial Notice is given separate treatment.

The Question Is: What documents or facts which may become germane to a decision of this case come within the prin-

ciples under which this Court will take judicial notice of such documents and facts?

STATEMENT OF THE CASE

Under the Federal Emergency Relief Appropriation Act of 1939, 53 Stat 927, Ch 252, the appellee's agencies, City of Greensboro and Greensboro City Board of Education, made application for a WPA grant to build the golf course involved in this case. The grant of 65 per cent of the cost was made and the golf course was built, later becoming known as Gillespie Park Golf Course. (See Appendix 1 (a), Page 80 and Fact No. 4, infra, Page 13.)

As required by said Federal Act and its authorized regulations, appellee's said agencies agreed with the United States (1) that the golf course would be a public course, (2) that the City of Greensboro would maintain and operate the golf course during its useful life for the benefit of the public, and (3) that during the useful life of the golf course it would not be leased or otherwise disposed of to a private individual or corporation or to a quasi-public corporation. (See Fact No. 4 infra, Page 13.)

Appellee State's agency, City of Greensboro, describes the agreement with the United States Government on Pages 4, 7 and 8 of its "Brief and Appendix" on appeal to the United States Court of Appeals for the Fourth Circuit (No. 7450 on the Docket of that Court, filed May 14, 1957) and photographic reproductions of those pages are attached hereto as Appendix 1 (a), Appendix 1 (b), and Appendix 1 (c), respectively. The District Court's Finding of Fact No. 20 and Conclusion of Law No. 3, complained of by City of Greensboro on said pages, but affirmed by the Court of Appeals, read as follows (See pages 71, 76 of Appellants' Statement as to Jurisdiction.):

Finding of Fact No. 20: "On the 15th day of February, 1940, the defendant City of Greensboro and the defendant Greensboro City Board of Education entered into an agreement with the Government of the United States for the construction of a golf course on land, part of which was owned by the City of Greensboro and part by the Greensboro City Board

of Education, under which agreement the United States Government provided 65% of the cost of constructing said golf course. That in order to induce the United States Government to provide 65% of the cost, the defendants City of Greensboro and Greensboro City Board of Education agreed with the United States Government that (1) this golf course was 'for the use or benefit of the public.' (2) that the City of Greensboro would maintain and operate said golf course for the use and benefit of the public during the useful life of said golf course and (3) that said golf course would not 'be leased, sold, donated, or otherwise disposed of to a private individual or corporation, or quasi-public corporation, during the useful life of' said golf course: Said golf course became known as the Gillespie Park Golf Course and is the golf course involved in this action."

Conclusion of Law No. 3: "The said agreement between the City of Greensboro, the Greensboro City Board of Education, and the United States Government imposed a duty upon the defendants in this case to maintain and operate the Gillespie Park Golf Course during its useful life for the benefit of public, including the Negro public, and that duty could not be voided by the execution of the leases involved in this case."

The Greensboro City Board of Education leased its interests to the City of Greensboro, and from the time the golf course was first opened until 1949 the City operated it exclusively for white citizens. (See Appendix 1 (a), Page 80, and Fact No. 2 infra, Page 13.)

When Negro citizens of Greensboro in 1949 became insistent upon their right to use the golf course, they were formally denied such right by resolutions of the Greensboro City Parks and Recreation Commission and the Greensboro City Council. (See infra, Page 61.) Thereupon, the Chairman of the City Parks and Recreation Commission, John R. Hughes, became the chief promoter of the organization of Gillespie Park Golf Club, Inc., and the prime negotiator of leases of the golf course from appellee's agencies, City of Greensboro and Greensboro City Board of Education to Gillespie Park Golf Club, Inc. (See infra, Page 62.) When City of Greensboro finally termi-

nated the leases, the City Council passed a resolution which recited: "Whereas, The Gillespie Park Golf Club, Inc., was created a non-profit, non-stock corporation and no person, other than the City, has invested any funds in the corporation or in the Golf Course and its equipment, and the Golf Club has operated solely on funds derived from the use of the Golf Course." (See Appendix 2 (g), Page 89.)

Subsequent to the making of the leases, the City of Greensboro built nine additional holes to the golf course, "which it had reserved the right to do under the lease," (See Appendix 1 (a), Page 80.) Apparently in an effort to comply with the "separate but equal" doctrine, the city built the 9-hole Nocho Park Golf Course for Negroes. (See Fact No. 3 infra, Page 13.)

On December 7, 1955, appellants sought permission to play Gillespie Park Golf Course by paying greens fees, as others were allowed, but were denied on the ground that "it was a private club for members and invited guests only" (R 44). Appellants placed the greens fees on the table and played without permission of the Assistant Golf Pro in charge. (See Facts No. 8 and No. 7 infra, Page 14.)

Appellants' conduct was entirely peaceful.—See testimony of State's witnesses: Deputy Sheriff Darby (R 49), Assistant Golf Pro Bass (R 43), and Golf Pro Edwards (R 45). Appellants were arrested upon warrants in Greensboro Municipal-County Court, charging criminal trespass under said statute, GS 14-134.

The warrants alleged a trespass upon property of "Gillespie Park Golf Course." Appellants were tried and convicted. Upon appeal to and trial de novo in the Superior Court of Guilford County, the proof showed the name of the corporation to be "Gillespie Park Golf Club, Inc." instead of as set out in the warrants, and amendment of the warrants accordingly was allowed by the trial court. Appellants were convicted and sentenced to 30 days in jail.

On appeal, the Supreme Court of North Carolina **on its own motion** found a "fatal variance" between the name of the corporation as alleged in the warrants and the name as shown

in the proof and amended warrants. Judgment was for this reason arrested by the State Supreme Court. 246 NC 518.

While the case upon the first set of warrants was pending on appeal in the Supreme Court of North Carolina, appellants brought suit in the United States District Court for the Middle District of North Carolina against appellee's agencies, City of Greensboro, Greensboro City Board of Education, and Gillespie Park Golf Club, Inc. (Civil Case No. 1058), seeking a declaration of the rights of the parties under the Federal Constitution with regard to the acts of appellants in playing golf on said golf course, for which they had been convicted and sentenced in the State court. (See Motion to Quash, R 32-33, and the Motion to Set Aside the Verdict, R 92)

After trial of the issues appellants prevailed, and the Federal District Court filed its Opinion, Findings of Fact, Conclusions of Law, and Declaratory Judgment, (See Pages 67-79, appellants' Statement as to Jurisdiction), which Judgment declared that appellee's said agencies had " . . . unlawfully denied the plaintiffs as residents of the City of Greensboro, North Carolina, the privileges of using the Gillespie Park Golf Course, and that this was done solely because of the race and color of the plaintiffs, and constitutes a denial of their constitutional rights . . ." (R 92) The Opinion of the Federal District Court is reported in **Simkins et al. v City of Greensboro et al., 149 Fed Supp 562.** The Court of Appeals for the Fourth Circuit affirmed in **City of Greensboro et al. v Simkins et al., 246 Fed 2d 425.** Certiorari was not sought in this Court.

After said affirmance by the Court of Appeals, appellee State caused indictments to be issued against appellants in the Superior Court of Guilford County, charging the same alleged trespass for the same alleged acts of playing golf. (R 36-42) When the indictments were called for trial on December 2, 1957, the appellee State took a Nol Pros with leave in all of the indictments. (R 43)

On the same day, December 2, 1957, appellee State caused appellants to be arrested upon a second set of warrants in the Greensboro Municipal-County Court, charging the same alleged trespass for the same acts of playing golf. (R 2-25)

These are the warrants upon which the appellants stand convicted and sentenced to 15 days in jail in this case.

Four of the warrants (R 2, 7, 10, 14) alleged the name of corporation to be "Gillespie Park Club, Inc.," and only two of the warrants (R 18, 22) alleged the name to be "Gillespie Park Golf Club, Inc." But this "fatal variance" which the Supreme Court of North Carolina noticed of its own motion in its first opinion (246 NC 518), was not noticed at all in the State Supreme Court's opinion directly involved on this appeal. (107-118)

In apt time appellants filed in the Municipal-County Court a Motion to Quash the warrants, alleging that they were "Negro citizens of Greensboro," and "that GS 14-134 is hereby being unconstitutionally applied to these defendants on the following grounds:"—setting out at some length appellants' contentions of violations of their rights under the Supremacy Clause and the 14th Amendment of the Constitution of the United States. (R 32-36) The motion was denied and appellants were tried and convicted. (See R 108)

Upon appeal to and trial de novo in the Superior Court of Guilford County, appellants in apt time renewed their Motion to Quash, which was denied. (See R 108)

During their voir dire examinations, those members of the jury who had played on Gillespie Park Golf Course "stated very frankly and freely in open court that they had played on this course without any requirements except the payment of greens fees." (R 93)

During the trial appellants sought on cross-examination of appellee's witnesses to show the practice of racial discrimination against Negroes in the operation of Gillespie Park Golf Course, but appellee State's objection was sustained to this type of question "as being immaterial." (R 45, 48)

Although John R. Hughes, President of Gillespie Park Golf Club, Inc., was present in court, appellee State rested its case without calling him as a witness. (R 50) When appellants sought to call him as an adverse witness, this request was denied. (R 72) Appellants then put the witness Hughes on the

stand and sought to prove his testimony before the United States District Court for the Middle District of North Carolina in the **Simkins Case, supra.** But Mr. Hughes said: "I did not testify for my association in the case of Simkins and others against City of Greensboro, Board of Education and Gillespie Park Golf Club, Inc."

Then counsel for appellants in the trial court said: "Q. Mr. Hughes, I hold in my hand a document purporting to be a transcript of the testimony in the case." (R 78) The objection of appellee State was sustained, and the mouth of the president of appellee's agency, whose employees were the prosecuting witnesses in this case, was closed against the truth which was elicited from him in the Federal District Court. That was in the presence of the Jury.

When the Jury had retired, the following took place, as appears on Page 79 of the Record:

"In the Absence of the Jury, Mr. John R. Hughes made the following statement to the Court:

"Mr. Hughes: If your Honor please, I would like to ask the Reporter to read the question and answer which I gave in my testimony, so that we may get the record straight.

"Question Read by Reporter as follows: 'Mr. Hughes, did you testify for your Association in the case of Simkins and others against the City of Greensboro, Board of Education, and Gillespie Park Golf Club, Inc.?'

"Mr. Hughes: In order that there may be no misunderstanding, I did testify in that case, but I was called as an adverse witness for the plaintiffs.

"Court: Do you wish to call Mr. Hughes back to the stand?

[1]"Mr. Marsh: No, your Honor."

Appellants were found guilty. Before they were sentenced

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[1]Under Napue v Illinois, ___US___, 3 L ed 2d 1217, 1221 ___S Ct___, it would appear that appellee's Solicitor in charge of the prosecution had "'the responsibility and duty to correct'" the wrong impression which the witness Hughes had given to the Jury.

appellants filed a Motion to Set Aside the Verdict (R 91-97), by reference making certain allegations of the Motion to Quash a part of the Motion to Set Aside the Verdict (R 91), including the allegation (R 32) "that GS 14-134 is hereby being unconstitutionally applied to these defendants," for the reasons under the Supremacy Clause and the 14th Amendment set out in the Motion to Quash.

Appellants also set out verbatim in the Motion to Set Aside the Verdict the Declaratory Judgment and Findings of Fact No. 33 and No. 30 of the Federal District Court in the **Simkins Case, supra,** (R 82, 94, 95-96), and in some detail alleged violations of the Supremacy Clause and the 14th Amendment under the facts and circumstances of the case. The Motion to Set Aside the Verdict was denied. (R 97) On appeal the Supreme Court of North Carolina upheld the trial court's denial of the Motion to Quash (R 110) and of the Motion to Set Aside the Verdict (R 118), and found "No Error" in any of the actions of the trial court. (R 118).

With reference to the Federal Court proceedings in the **Simkins Case,** the Supreme Court of North Carolina said in its Opinion in this case: **"Our knowledge of the facts in that case is limited to what appears in the published opinion."** (R 115) [2]Pertinent "Facts" in said "published Opinion" follow, being numbered for identification:

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[2]The consideration which this Court gives to "facts" set out in the Opinion of a United States District Court is indicated by the following quotation from the case of **Bibb v Navajo Freight Lines,** ___US___, 3 L ed 2d 1003, 1007, ___S Ct___:

> "Illinois introduced evidence seeking to establish that contour mudguards had a decided safety factor in that they prevented the throwing of debris into the faces of drivers of passing cars and into the windshields of a following vehicle. But the District Court **in its opinion stated** that it was 'conclusively shown that the contour mud flap possesses no advantages over the conventional or straight mud flap previously required in Illinois and presently required in most of the states,' (159 F Supp., at 388) and that 'there is rather convincing testimony that use of the contour flap creates hazards previously unknown to those using the highways.' Id. 159 F Supp at 390." (Emphasis added.)

"Facts" In Federal District Court's Opinion

Fact No. 1—"The City of Greensboro and the Greensboro City Board of Education concede that they cannot own and operate the Gillespie Park Golf Course for the public and exclude the plaintiffs and other Negro citizens of Greensboro from these privileges on account of their color." (149 Fed Supp 563).

Fact No. 2—"Although the golf course has been available to the public for many years, whether by design or otherwise, Negroes have been denied the enjoyment of the privilege." (149 Fed Supp 563).

Fact No. 3—"The City of Greensboro, befpre Brown v Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 256, in an effort to comply with Plessy v. Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256, erected in the City of Greensboro a nine hole golf course for Negroes, known as Nocho Park Golf Course, but it cannot be deemed the equivalent of an 18 hole golf course like Gillespie Park course which was restricted to white people." (149 Fed Supp 563).

Fact No. 4—"The Board of Education leased the land it did not need for school purposes at the time to the City of Greensboro. Through Works Progress Administration, which furnished 65% of the cost, the City of Greensboro built the last nine holes and agreed not to sell or lease for private use this public property during its life of usefulness." (149 Fed Supp 563).

Fact No. 5—"Some of the Negro citizens applied to the City authorities for permission to play on the Gillespie Park Course in 1949 and, because of opposition on the part of local citizens against Negroes playing on the course, after some negotiation, the City of Greensboro and City Board of Education entered into a lease contract whereby the entire golf course was leased to Gillespie Park Golf Club, a non-profit corporation which was organized solely for the purpose of taking the lease and maintaining and operating the course as a public golf course. G.S. N.C. Sec. 55-11." (149 Fed Supp 563)

Fact No. 6—"It is true the directors met with a quorum at

first and fixed $60 for annual membership which permitted them to play without paying additional fees; also authorized $1 membership who would pay $1.25 greens fees on holidays and week-ends, and 75¢ on other days." (149 Fed Supp 563)

Fact No. 7—"The records of the corporation do not disclose sufficient data to show if rules were really established and enforced in respect to membership. The evidence does clearly show that white people were allowed to play by paying the greens fees without any questions and without being members. When Negroes asked to play, they were told they would have to be members before they could play and it clearly appears that there was no intention of permitting a Negro to be a member or to allow him to play, solely because of his being a Negro." (149 Fed Supp 563)

Fact No. 8—"The six plaintiffs presented themselves at the desk of the man in charge of the golf course and laid down 75¢ each and asked to play, the first named plaintiff being a dentist practicing his profession in Greensboro. But they were not given permission to play. They insisted on their right to play and played three holes. While playing the third hole, the manager came and ordered them to leave and they refused to go unless an officer arrested them. Whereupon the manager swore out a warrant charging each with trespass upon which they were tried, convicted and sentenced to 30 days in jail, the statutory limit, from which an appeal is pending in the Supreme Court of North Carolina." (149 Fed Supp 563).

Fact No. 9—"The Negroes have not only been denied the privilege of the golf course but there is no intention on the part of the defendants to permit them to do so unless they are compelled by order of court." (149 Fed Supp 563).

Fact No. 10—"The brief filed by the City of Greensboro contains this significant statement in its statement of facts: 'In December, 1955, six of ten plaintiffs in this action were denied the use of Gillespie Park Golf Course by employees of Gillespie Park Golf Club, Inc. That same month the City Council instructed the City Manager to proceed forthwith to receive bids for the sale of Gillespie Park Course and upon such sale to close the Nocho Park course. The land upon which the latter

is situated is to be used for governmental purposes and is not to be sold.' The facts show that the city is still 'in the saddle' so far as real control of the park is concerned and that the so-called lease can be disregarded if and when the City decides to do it. It also lends powerful weight to the inference that the lease was resorted to in the first instance to evade the city's duty not to discriminate against any of its citizens in the enjoyment in the use of the park." (149 Fed Supp 565).

Fact No. 11—"This golf club permits white people to play without being members, or otherwise, except it requires the prepayment of greens fees. The plaintiffs here paid their fees, were forced off the course by being arrested for trespass. Everybody knows this was done because the plaintiffs were Negroes and for no other reason. This court cannot ignore it." (149 Fed Supp 565).

Fact No. 12—"A decree will be entered declaring that these plaintiffs have been denied on account of their color equal privileges to use the golf course owned by the City Board of Education and the City of Greensboro and operated by the Gillespie Park Golf Club, and permanently restraining the defendants from discriminating against plaintiffs and other members of their race on account of color, so long as the golf course is owned by these agencies and operated for the pleasure and health of the public, their agents, lessees, servants and employees. The court invited counsel for the respective parties to confer and to suggest to the court the best practical way to make effective the decree, in the event the plaintiffs prevailed. The final decree will be deferred a short time to get the result of this conference." (149 Fed Supp 565).

Matters of Common or General Knowledge

There are some matters of common or general knowledge in this case. They include the policy of racial exclusion of Negroes from this golf course over the years of its operation, as stated by Judge Hayes in Fact No. 2 and also in Fact No. 11, supra, when he said of the exclusion of appellants: "Everybody knows this was done because the plaintiffs [appellants here] were Negroes and for no other reason. This court cannot ig-

nore it." They also include the continued **"in-the-saddle"** connection with the golf course of appellee's State agency, City of Greensboro, as stated by Judge Hayes in Fact No. 10, supra.

As substantiating matters of common or general knowledge pertinent to the issues involved in this case, appellants attach hereto photographic reproductions of newspaper clippings, marked Appendixes 2 (a) to 2 (f) inclusive, and a photographic reproduction of Page 190 of Minute Book No. 31 of the Minutes of the City Council of the City of Greensboro, North Carolina, marked Appendix 2 (g).

SUMMARY OF ARGUMENT

The following is a Summary of the Argument for appellants:

A. ON THE QUESTION OF JURISDICTION

Appellants contend that Federal Questions involved were raised in written Motions to Quash and to Set Aside the Verdict before the trial court, that appellee State did not answer to deny or controvert any of the allegations of these Motions, that under both State and Federal law these allegations should have been taken as true, that the trial court denied these Motions and this denial was sustained by the Supreme Court of North Carolina.

Appellants contend that the Opinion of the Supreme Court of North Carolina in this case shows that the Motions which raised Federal Questions were denied on the merits, and not on any ground of local procedure or practice. In this connection appellants contend that the Opinion of the Supreme Court of North Carolina said in so many words that the State Court was "considering the merits" of the case.

Appellants contend that, since Federal Questions were raised in pleadings, under the decisions of this Court this Court will decide for itself whether these Federal Questions were well taken and this Court is not concluded by what the State courts have decided with regard to these pleadings.

Appellants also contend that the North Carolina Supreme

Court's Opinion and judgment themselves deny to appellants Federal constitutional rights, and that this denial could not be called to the attention of the Supreme Court of North Carolina, because no petition for rehearing is permitted in a criminal case in that court.

Appellants contend that this Court has jurisdiction on appeal under 28 USC 1257 (2), because the written Motions before the State courts alleged that the North Carolina criminal trespass statute which is involved (GS 14-134), as construed and applied in this case, violates the Supremacy Clause and the 14th Amendment of the Constitution of the United States, and that the decisions of the State courts were necessarily in favor of the validity of this criminal trespass statute as construed and applied in this case.

Appellants contend that this Court has jurisdiction (1) to examine the record to determine for itself whether racial discrimination in the use of the public golf course involved is shown within the meaning of the decisions of this Court; (2) to determine whether the record shows a denial of equal protection without regard to racial discrimination; (3) to determine whether the fundamental fairness required by the Due Process Clause has been denied to appellants in the trial of this case; (4) to determine whether or not the State Supreme Court's judgment violates the agreement made by the State's agencies with the United States covering the use of this golf course, or whether the policy of the State law and the State court's judgment collide with Federal law and regulations concerning this golf course; (5) to protect and effectuate the Declaratory Judgment of the Federal Courts with regard to this golf course.

Appellants also point to the similarity between the instant case on the Question of Jurisdiction on appeal and certain recent decisions of this Court taking jurisdiction on appeal.

However, appellants have prayed that, if they should be mistaken in their belief that this Court has jurisdiction on appeal under 28 USC 1257 (2), that then the appeal papers be treated as a Petition for Certiorari and that such Petition be granted under 28 USC 2103.

B. ON THE MERITS

(1) Under the Supremacy Clause:

Appellants contend that the State's criminal trespass statute (GS 14-134), as applied in this case, and the State Supreme Court's judgment enforcing said statute violate the Supremacy Clause in three particulars:

(a) They implement a policy which made Gillespie Park Golf Course "a private club for members and invited guests only," directly in conflict with an applicable Federal statute and its supporting regulations which require that this golf course "offer the greatest degree of public usefulness."

(b) They implement a policy violating an agreement by the State's agencies with the United States that this golf course would be operated for the benefit of the public and would not "be leased, sold, donated, or otherwise disposed of to a private individual or corporation, or quasi-public corporation" during the useful life of said golf course.

(c) They implement a policy directly in conflict with a Federal District Court's Declaratory Judgment in Simkins et al. v City of Greensboro et al., 149 Fed Supp 562, as affirmed by the Court of Appeals for the Fourth Circuit.

(2) Under the Fourteenth Amendment:

(a) Denial of Equal Protection.

Appellants contend that they have been denied the equal protection of the laws in this case because (1) They were denied the use of Gillespie Park Golf Course because of race or color, and (2) The record shows a denial of equal protection because of a "lack of standards" in the permission-granting authority for use of the golf course.

(b) Denial of Due Process of Law.

Appellants contend that they have been denied due process of law in this case in that (1) In the trial of this case the State closed the mouths of certain key witnesses to the truth, so that evidence material to appellants' defense was suppressed by the State's rules of evidence. (2) The Supreme Court

of North Carolina in this case for the first time held the criminal trespass statute applied to the public lands of this golf course, and not just to lands "privately held," as the State Supreme Court had theretofore always held, and that appellants therefore could not know "with reasonable certainty" that they were violating this statute by playing on this public golf course. (3) In this case three original, successive criminal proceedings have been prosecuted by the State against appellants in such a way as to amount to fundamental unfairness as forbidden by the Due Process Clause of the 14th Amendment.

C. THE QUESTION OF JUDICIAL NOTICE

Appellants treat the question of Judicial Notice separately because, insofar as this question may become important in this case, appellants believe that it may cut across both the Question of Jurisdiction and The Case on the Merits.

Appellants take the position that the decisions of this Court on the Question of Judicial Notice, as well as the reasonable bases of judicial notice, would require that judicial notice be taken of any necessary documents or facts which were not before the State courts as a matter of uncontroverted pleading or otherwise.

ARGUMENT I

The Question of Jurisdiction

(a) Raising of Federal Questions Below—

The Federal questions were first raised by appellants in the trial court by a Motion to Quash the warrants (R 32), and then by a Motion to Set Aside the Verdict (R 91), the latter incorporating certain allegations of the former by reference.

In both motions it was alleged that the North Carolina criminal trespass statute (GS 14-134), under which appellants stand convicted, was "being unconstitutionally applied" to appellants in that, among other things:

"The State of North Carolina in this prosecution is, contrary to the Supremacy Clause of the United States Constitu-

tion, attempting to make a crime out of specific acts and conduct which both the United States District Court for the Middle District of North Carolina and the United States Court of Appeals for the Fourth Circuit have specifically held to be protected by the Fourteenth Amendment to the Constitution of the United States." (R 32, 92)

Both motions also alleged:

"To permit this prosecution to proceed would be in effect to nullify and render ineffectual the judgment and decree of the United States Courts, contrary to the Supremacy Clause of the United States Constitution and such prosecution would violate the rights of these defendants and laws of the United States, including the Fourteenth Amendment." (R 34, 92)

Both motions further alleged:

"Based upon the specific facts and conduct alleged by the State to be a crime in this case, these defendants brought Civil Action No. 1058 in the United States District Court for the Middle District of North Carolina, praying for a declaratory judgment and a decree enjoining the prosecution witnesses and the city of Greensboro and the Greensboro City Board of Education from interfering with the defendants and all other Negroes similarly situated from playing golf on the Gillespie Park Golf Course.

"A full hearing was held before United States District Judge Johnson J. Hayes, who on April 24, 1957, found specifically that the prosecuting witnesses and the City of Greensboro had refused to permit these defendants to play golf 'primarily because of their color' (Finding of Fact No. 33), and concluded as a matter of law that these defendants 'and other Negroes similarly situated cannot be denied on account of race, the equal privileges to the park, notwithstanding the lease.' " (R 33, 92)

Both motions further alleged:

"These defendants have subpoenaed the Clerk of the United States District Court for the Middle District of North Carolina to bring to this trial the full record and judgment roll

in said case and respectfully request an opportunity to offer this evidence upon the hearing of this motion.

"Defendants respectfully urge the Court to receive and consider the record and judgment roll in the Federal case and after such consideration to estop the State and the prosecuting witnesses from proceeding further with this prosecution." (R 33, 92)

Both motions alleged the former trial upon the first set of warrants and the indictments in the Superior Court, and alleged that the trial upon the second set of warrants amounted to double jeopardy in violation of the Federal Constitution. (R 34-35, 92).

The Motion to Set Aside the Verdict alleged:

"That the Supremacy Clause (Article VI) of the Constitution of the United States requires this Court to give effect to and to enforce the judgments of the United States Courts covering the subject matter of this prosecution, particularly the 'Decree and Injunction' of the United States District Court for the Middle District of North Carolina, in Civil Case No. 1058, in which these defendants were plaintiffs and Gillespie Park Golf Club, Inc., was one of the defendants, covering the identical acts and conduct charged by the State to be a crime of trespass in this case, said 'Decree and Injunction' reading in part as follows:

" 'It is now ordered, adjudged and decreed that defendants HAVE UNLAWFULLY DENIED THE PLAINTIFFS as residents of the City of Greensboro, North Carolina, the privileges of using the Gillespie Park Golf Course, AND THAT THIS WAS DONE SOLELY BECAUSE OF THE RACE AND COLOR OF THE PLAINTIFFS, and constitutes a denial of their constitutional rights, and unless restrained will continue to deny plaintiffs and others similiarly situated.' (Emphasis added.)

"That the State of North Carolina and its jury in this case undertake to find to be criminal the identical acts and conduct whch said 'Decree and Injunction' holds to be protected by the Constitution of the United States, and further undertake to find to have been lawfully done, that which said 'Decree

and Injunction' holds was 'unlawfully' done, and that to permit said verdict to stand and to punish these defendants on the basis of said verdict would nullify and render ineffectual the rights of these defendants which said 'decree and injunction' holds to be guaranteed and protected by the Constitution and laws of the United States, including the due process and equal protection clauses of the 14th Amendment." (R 92)

Said Motion to Set Aside the Verdict quoted Fact No. 11, supra, page 15, from the Opinion of Judge Hayes, and followed with this request of the trial Court:

"Defendants respectfully request this Court to take judicial notice of this matter of common knowledge pertaining to this public golf course owned and operated by their agency by the City of Greensboro and the Greensboro City Board of Education. That this matter of common knowledge about the Gillespie Park Golf Course was spoken truly and not idly by Judge Hayes when he wrote that 'everybody knows' it, was shown by Jurors in this case in their answers to questions touching their qualifications. Those who had played on Gillespie Park Golf Course stated very frankly and freely in open court that they had played on this course without any requirements except the payment of greens fees. Defendants respectfully suggest that, if any confirmation of Judge Hayes' statement that this was common knowledge which 'everybody knows' is necessary it is found in these statements of the Jurors in this case." (R 93)

The Motion to Set Aside the Verdict also alleged:

"Defendants respectfully suggest to the Court that to permit this verdict to stand under these circumstances would violate the rights of these defendants under the Constitution and laws of the United States, including the due process and equal protection clauses of the 14th Amendment." (R 93)

The Motion to Set Aside the Verdict also alleged:

"That said 'Decree and Injunction' of the United States District Court for the Middle District of North Carolina begins as follows: 'This cause coming on for hearing and the Court having heard the evidence and argument of counsel and carefully considered the same and the briefs filed, and having

made the findings of fact and conclusions of law which appear of record.'

"Defendants respectfully suggest to the Court that this reference in said 'Decree and Injunction' to the findings of fact and conclusions of law which appear of record makes them a part of the 'Decree and Injunction' just as if written out therein in full; and for this reason and also because said findings of fact and conclusions of law are a part of the record and judgment roll in said case in the United States District Court for the Middle District of North Carolina covering the identical acts and conduct which said verdict seeks to make a crime, the Supremacy Clause of the Constitution of the United States lays a duty upon this Court to respect and give effect to said findings of fact and conclusions of law, and especially to Finding of Fact 33, which reads as follows:

" 'White citizens of Greensboro are given the privilege of becoming permanent members by paying $60.00 per year without greens fees and others not permanent members by paying $1.00 per year and greens fees of $.75, except on holidays and weekends, when it is more. On days other than holidays and weekends when greens fees are $1.25 white citizens are permitted to play without being members by paying the fees above set forth and without paying the extra $1.00 and without any questions being put to them. When the plaintiffs applied to be given the same privilege they were refused on the ground that they were not members but primarily because of their color. Plaintiffs laid the greens fees on the table in the club house, went out to play and after they had gotten to the 3rd hole the 'pro' in charge of the golf course ordered them off and they insisted they had a right to play and would not get off unless they were arrested by an officer, whereupon the 'pro' had them arrested and they were tried and convicted and sentenced to imprisonment for a period of 30 days, which is the maximum under the law for the State of North Carolina for trespassing.' " (R 93-94)

The Motion to Set Aside the Verdict also alleged:

"That the evidence in this case and the instructions of the Court to the Jury show that the land on which Gillespie Park

Golf Course is situated is public and not private property, whereas GS 14-134, which is the North Carolina statute under which the warrants were drawn in this case, is meant to cover private property and not public property." (R 95)

"Defendants respectfully suggest to the Court that this statute was never intended to apply to public lands or public property, but was and is intended to apply solely and only to private property, and that the lands and property and the possession alleged to have been invaded in this case was public lands and property and the possession of an agency of the City of Greensboro and the Greensboro City Board of Education, which held the title to said lands and property. In this connection, defendants respectfully call the Court's attention to Finding of Fact No. 30 in said case in the United States District Court for the Middle District of North Carolina:

" 'That the leases in this case undertook to turn over to a corporation having no assets or income highly valuable income-producing property belonging to the City and the school board, the chief officer and promoter of said corporation being an official of the city, and the city having no prospect of getting anything from said leases except out of the income which the leased property was already bringing in, and with the City reserving the right to put into the property further investments from other sources than said income and that under these circumstances said corporation was in fact an agency of the City and the school board for the continued maintenance and operation of the golf course for the convenience of the citizens of Greensboro.' " (R 95-96)

The Motion to Set Aside the Verdict also alleged:

"Defendants further suggest to the Court that as citizens and taxpayers of the City of Greensboro, these defendants along with all other such citizens and taxpayers did have a license to go upon said lands upon which said Golf Course was situated, and that there is no evidence whatsoever in this case that these defendants were 'without a license' to go upon or to remain upon said lands, and that the absence of such a license is an indispensable ingredient of the trespass established by GS 14-134." (R 96)

THE APPELLEE STATE DID NOT ANSWER OR DENY OR CONTROVERT THE MOTION TO QUASH OR THE MOTION TO SET ASIDE THE VERDICT, OR ANY OF THE ALLEGATIONS CONTAINED IN EITHER MOTION.

The rule of pleading in North Carolina, both by statute and also by decisions, is that where the allegations of a pleading are not answered or denied, the facts alleged must be taken as true. **GS 1-159. Bonham v Craig, 80 NC 224, 227.**

Immediately after Section 1-159 of the official edition of the General Statutes of North Carolina (1953) is the following: **"Editor's Note.—The rule established by this section disposed of the necessity of submitting to the jury matters which the law deems as admitted in the absence of denial."**

The same rule applies in the decisions of this Court as to allegations concerning Federal rights, which are not answered or denied. **Tomkins v Missouri, 323 US 485, 89 L ed 407, 65 S Ct 370.**

(b) Actions of Courts Below on Motions to Quash and to Set Aside the Verdict—

The trial Court denied the Motion to Quash, the North Carolina Supreme Court putting it this way: **"Before pleading to the merits in the Superior Court, defendants renewed their motions to quash as originally made in the Municipal-County Court. The motions made in apt time were overruled by the court." (R 108)**

In sustaining this action of the trial Court, the Supreme Court of North Carolina said: **"Since none of the reasons nor all combined sufficed to sustain the motion to quash,** the court correctly overruled the motion and put defendants on trial for the offense with which they were charged." (R 110)—(Emphasis added.) It is clear to appellants that since the allegations of the Motion to Quash were not answered or denied and thus must be taken as true, the decision of the North Carolina Supreme Court amounts to a holding that the motion did not contain allegations sufficient to constitute a defense, under the Constitution and laws of the United States, to the criminal trespass prosecution.

As to the Motion to Set Aside the Verdict, this too was denied by the trial Court (R 97), and in sustaining this action the Supreme Court of North Carolina said: **"Defendants were not, as a matter of right, entitled to have the verdict set aside."** (R 118) Since the allegations of the Motion to Set Aside the Verdict were not answered or denied, it is likewise clear to appellants that this action of the North Carolina Supreme Court amounts to a holding that the motion did not contain allegations sufficient to constitute a defense, under the Constitution and laws of the United States, to the criminal trespass prosecution.

With regard to the question of Double Jeopardy, the Supreme Court of North Carolina said: **"It is manifest there is here no double jeopardy."** Appellants believe that this is a clear decision of this question on the merits.

(c) Decisions of this Court Regarding Federal Questions Raised in Pleadings—

The general rule was restated in the case of **Staub v City of Baxley, 355 US 313, 318, 2 L ed 2d 302, 309, 78 S Ct 277:**

> **"'Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of federal law; and where a case coming from a state court presents that question, this Court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court.' First Nat. Bank v Anderson, 269 US 341, 346, 70 L ed 295, 302, 46 S Ct 135, and cases cited. See also Schuylkill Trust Co. v Pennsylvania, 296 US 113, 122, 123, 80 L ed 91, 98, 56 S Ct 31, and Lovell v Griffin, 303 US 444, 450, 82, L ed 949, 952, 58 S Ct 666. As Mr. Justice Holmes said in Davis v Wechsler, 263 US 22, 24, 68 L ed 143, 145, 44 S Ct 13, 'Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.' Whether the constitutional rights asserted by the appellant were ' . . . given**

due recognition by the [Court of Appeals] is a question as to which the [appellant is] entitled to invoke our judgment, and this [she has] done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support . . . [for] if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided.' Ward v Love County, 253 US 17, 22, 64 L ed 751, 758, 40 S Ct 419, and cases cited."

See also Allied Stores of Ohio v Bowers, ____US____, 3 L ed 2d 480, 483, 79 S Ct 437, where it is stated that this principle now "is settled."

In Brown v Western Railway of Alabama, 338 US 294, 295, 296, 94 L ed 100, 102, 103, 70 S Ct 105, a demurrer was sustained to a complaint asserting Federal rights, and the cause dismissed by the state courts. On certiorari, this Court said of the conclusions of the Georgia Court of Appeals regarding the complaint:

"The court reached the foregoing conclusions by following a Georgia rule of practice to construe pleading allegations 'most strongly against the pleader.' "

"It is contended that this construction of the complaint is binding on us. The argument is that while state courts are without power to detract from 'substantive rights' granted by Congress in FELA cases, they are free to follow their own rules of 'practice' and 'procedure.' To what extent rules of practice and procedure may themselves dig into 'substantive rights' is a troublesome question at best as is shown in the very case on which respondent relies. Central Vermont R. Co. v. White, 238 US 507, 59 L ed 1433, 35 S Ct 865, Ann Cas 1916B 252, 9 NCCA 265. Other cases in this Court point up the impossibility of laying down a precise rule to distinguish 'substance' from 'procedure.' Fortunately, we need not attempt to do so. A long series of cases previously decided, from which we

see no reason to depart, makes it our duty to construe the allegations of this complaint ourselves in order to determine whether petitioner has been denied a right of trial granted him by Congress. This federal right cannot be defeated by the forms of local practice . . . And we cannot accept as final a state court's interpretation of allegations in a complaint asserting it."

"Second. We hold that the allegations of the complaint do set forth a cause of action which should not have been dismissed."

(d) Jurisdiction to Examine the Record to Determine Whether or Not It Shows Racial Discrimination in This Case—

The appellee made quite a point in its Motion to Dismiss that "The Question of Racial Discrimination in the Use of the Golf Course Was Not Involved in This Case."

The jurisdiction of this Court to make such an examination of the record in connection with appellants' assertion of this Federal right seems to be well established. In **Niemotko v Maryland, 340 US 268, 271, 95 L ed 267, 270, 71 S Ct 325,** this Court said:

"In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded."[3]

In **Ashcraft v Tennessee, 322 US 143, 88 L ed 1192, 64 S Ct 921,** Headnote No. 1 in 88 L ed reads:

"Where the claim is made of denial of due process in a state court by obtaining a conviction through use of a

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[3]Regarding this same quotation from **Niemotko v Maryland,** this Court in **Napue v Illinois, supra (3 L ed 2d at 1222),** said that: "It is now so well settled that the Court was able to speak in Kern-Limerick, Inc. v Scurlock, 347 US 110, 121, 98 L ed 546, 556, 74 S Ct 403, of the 'long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself **facts or constructions** upon which federal constitutional issues rest." (Emphasis added.)

confession procured by coercion, the Supreme Court of the United States is bound to make an independent examination of the record to determine the validity of the claim, and **the performance of this duty cannot be foreclosed by the finding of a court or the verdict of a jury, or both."** (Emphasis added.)

(e) Jurisdiction to Determine the Validity of the Criminal Trespass Statute as Applied in This Case to Impose Criminal Punishment upon Appellants for Exercising Their "Constitutional Rights" to Play Golf, as Upheld by the Federal Courts.

A similar jurisdictional question arose in **Marsh v Alabama, 326 US 501, 502, 90 L ed 265, 266, 66 S Ct 276.** The Court stated the question as follows:

"In this case we are asked to decide whether a State, consistently with the First and Fourteenth Amendments, can impose criminal punishment on a person who undertakes to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town's management."

This Court continued (326 US 504): **"Appellant contended that to construe the state statute as applicable to her activities would abridge her right to freedom of press and religion contrary to the First and Fourteenth Amendments to the Constitution. This contention was rejected and she was convicted. The Alabama Court of Appeals affirmed the conviction, holding that the statute as applied was constitutional because the title to the sidewalk was in the corporation and because the public use of the sidewalk had not been such as to give rise to a presumption under Alabama law of its irrevocable dedication to the public . . . The State Supreme Court denied certiorari . . . and the case is here on appeal . . ."**

The **Marsh Case** is particularly pertinent to this case, so far as jurisdiction is concerned, because the state statute carrying the criminal sanctions was a criminal trespass statute almost identical with the statute which appellants allege to be unconstitutional as applied in this case. **This Court held that it had jurisdiction "on appeal."**

(f) Jurisdiction to Determine the Question of Equal Protection in This Case Without Regard to the Question of Racial Discrimination—

In the **Niemotko** case, supra, appellants were arrested for using a public park without permission and convicted for violating a disorderly conduct statute, which was challenged by appellants as violating their constitutional rights. Despite the jury's verdict of guilty and the rules of "practice" and "procedure" as determined by the state courts, this Court held that it had jurisdiction to review the Federal questions, saying: **"Being of opinion that the case presented substantial constitutional issues, we noted probable jurisdiction, the appeal being properly here under 28 USC 1257 (2)."** (340 US 270)

(g) Jurisdiction to Determine the Question of Due Process in This Case Concerning Appellants' Charges of "Fundamental Unfairness"—

(1) Appellants submit that the question of "fundamental unfairness" arises in connection with the testimony of the witness, John R. Hughes, president of the Gillespie Park Golf Club, Inc., and other witnesses. This is the witness who told the Jury: "I did not testify for my association in the case of Simkins and others against the City of Greensboro, Board of Education and Gillespie Park Golf Club, Inc." (R 77), but who in the absence of the jury asked and received permission to dictate this statement into the record: "In order that there may be no misunderstanding, I did testify in that case, but I was called as an adverse witness for the plaintiffs." (R 79)

In connection with the testimony of this very important witness, these appellants believe that it is quite significant that Federal Judge Hayes in the **Simkins Case** devoted several Findings of Fact to the activities of this witness (See Pages 72-74 of Statement as to Jurisdiction in this case.), one of which Findings of Fact (No. 26), with regard to the negotiations by which the leases were made to the golf corporation, said: ". . . at all times involved in these negotiations, the said John R. Hughes was Chairman of the Greensboro Parks and Recreation Commission."

(2) Appellants respectfully suggest that in this case the Supreme Court of North Carolina changed its long-standing rule that the criminal trespass statute involved in this case (GS 14-134) applied only to land "**privately held,**" to hold that it also applied to the **public lands** of Gillespie Park Golf Course, and that this question is a substantial one and gives this Court jurisdiction to determine whether or not the "reasonable certainty" which fundamental fairness requires of state criminal statutes was present in this case, within the meaning of such cases as **Scull v Virginia, supra.** Since no petition for rehearing was permissible, this change could not be called to the attention of the State Supreme Court.

(3) These claims are also made in regard to appellants' allegations of double jeopardy through the multiple criminal proceedings against them for the same alleged trespass upon Gillespie Park Golf Course.

In **Hoag v New Jersey, 356 US 464, 2 L ed 2d 913, 78 S Ct 829,** this Court held that it had jurisdiction on certiorari to review the claim of double jeopardy, stating the general rule to be with regard to multiple criminal proceedings: "**The question in any given case is whether such a course has led to fundamental unfairness.**" The Court also said: "**The question is whether this case involved an attempt 'to wear the accused out by a multitude of cases with accumulated trials.'**" (356 US 467)

On the question of fundamental unfairness in multiple criminal proceedings, Mr. Justice Frankfurter, concurring in **Brock v North Carolina, 344 US 424, 429, 97 L ed 456, 460, 73 S Ct 349,** said:

> "A State falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted or prevents a trial from proceeding to a termination in favor of the accused **merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time.**" **(Emphasis added.)**

All of these questions of unfairness with regard to the multiple criminal proceedings against these appellants for

playing golf on this public golf course are involved in this case, and appellants believe that, under the rules announced in the above cases, this Court has jurisdiction to hear them.

(h) Jurisdiction to Determine the Effect of the Agreement Made by Appellee's State Agencies with the United States Concerning Gillespie Park Golf Course—

Judge Hayes' Opinion in the **Simkins Case,** which the North Carolina Supreme Court said was before the State Courts, shows that Gillespie Park Golf Course was originally built pursuant to an agreement between appellee State's agencies, City of Greensboro and Greensboro City Board of Education on the one hand, and the Government of the United States on the other hand. (See Fact No. 4, supra).

(i) Jurisdiction to Protect or Effectuate Judgments of the Federal Courts—

Under **28 USC 2283** the jurisdiction of Federal Courts to "protect or effectuate" their judgments is not only recognized, but that jurisdiction is recognized to the extent that it becomes one of the rare cases meeting "the severe restrictions" of that statute's limitations upon the jurisdiction of Courts of the United States "to stay proceedings in a State court." See **Leiter Minerals, Inc. v United States, 352 US 220, 226, 1 L ed 2d 267, 273, 77 S Ct 287.** Also **Cf Capital Service, Inc. v National Labor Relations Board, 347 US 501, 98 L ed 887, 74 S Ct 699.**

That the United States District Court for the Middle District of North Carolina and the Court of Appeals for the Fourth Circuit would have jurisdiction by injunction to "protect or effectuate" their judgment in the **Simkins** case would seem to be clear. **Bland Lumber Co. v National Labor Relations Board, 177 Fed 2d 555; Jacksonville Blow Pipe Co. v Reconstruction Finance Corporation, 244 Fed 2d 394; Jackson v Carter Oil Co., 179 Fed 2d 524.** In **Jacksonville Blow Pipe** it was said (244 Fed 2d at 400):

> **"Finally, viewing only the statute in the abstract, the district court's action here appears to be clearly covered by the authority 'to protect or effectuate its judgments,' since all that is sought in the state litigation is to change the**

manifest effect of the actions and orders of the court appointed trustee, of the Referee, and of the court itself in approving the Bill of Sale including the blow pipe system; nothing would be as productive of friction between the state and the federal courts as to permit a state court to interpret and perhaps to upset such a judgment of a federal court."

State Court's Frustration of Federal Court's Judgment at Little Rock Enjoined.

Appellants think **Thomason v Cooper, 254 Fed 2d 808** in principle is practically on all-fours with the instant case. In **Thomason** an Arkansas Chancery Court at Little Rock issued an order "restraining the school board from requiring petitioner's child or any other white child from enrolling in and attending a school where both white and Negro children are enrolled and from enrolling Negro children in schools subject to the jurisdiction of Little Rock School Board which had been maintained exclusively for white children." (See 254 Fed 2d at 809-810.)

The Court of Appeals for the Eighth Circuit quoted in full **28 USC 2283**, which gives jurisdiction to and authorizes a Federal Court to enjoin state court proceedings in order "to protect or effectuate its judgments." Then, affirming the District Court's order enjoining proceedings under the state court's injunction, the Court of Appeals (254 Fed 2d at 810) said:

> "Obviously, the decree of the state Chancery Court was in direct conflict with the judgment and decree of the federal District Court and of this Court affirming that judgment and decree."
>
> "The federal District Court was certainly not required to permit the decree of the state court to frustrate the judgment and decree of the federal court approving and effectuating the plan of the School Board for the gradual integration of the schools."

The only difference which appellants see between **Thomason v Cooper** and the instant case is that in **Thomason** a state Chancery Court's injunction was used to attempt to frustrate

the judgment and decree of the Federal Courts, whereas in the instant case a state criminal court's warrant is used for this purpose.

The teaching of such cases as **Angel v Bullington, 330 US 183, 91 L ed 832, 67 S Ct 657,** as appellants believe, is that this Court, being **"a higher court . . . for an authoritative adjudication of the federal questions involved,"** (330 US 187) has the same jurisdiction with regard to the Federal questions as a lower Federal Court would have, if the action had been originally brought in the Federal Courts. This Court also said (330 US 188, 189):

> **"Here, claims based on the United States Constitution were plainly and reasonably made in the North Carolina suit. The North Carolina Supreme Court met these claims. It met them by saying that the North Carolina statute did not deal with substantive matters but merely with matters regulating local procedure. But whether the claims are based on a federal right or are merely of local concern is itself a federal question on which this Court, and not the Supreme Court of North Carolina, has the last say. That Court could not put a federal claim aside, as though it were not in litigation, by the talismanic word 'jurisdiction.' When an asserted federal right is denied, the sufficiency of the grounds of denial is for this Court to decide."**

It was held that failure to seek to have the federal claims reviewed by the Supreme Court of the United States after a final judgment in the Supreme Court of North Carolina, made the decision of the North Carolina Supreme Court conclusive by res judicata of the federal claims and federal rights involved, and that these federal claims and rights could not be asserted by an original action in the Federal Courts. Appellants believe that the clear implication of this is that this Court, in reviewing Federal rights and claims asserted in the state courts, has the jurisdiction and power to give all necessary relief to "protect or effectuate" those Federal rights and claims which the lower Federal Courts would have had, if the action had been originally commenced there.

Similarity to Frank v Maryland On Question of Jurisdiction

An examination of the Transcript of Record in **Frank v Maryland (Decided May 4, 1959), —US—, 3 L ed 2d 877, 79 S Ct 804,** shows great similarity with the instant case, so far as the question of jurisdiction is concerned.

In **Frank** appellant was first tried upon a warrant charging violation of a nuisance ordinance before a magistrate in Baltimore Police Court and, over challenge of the ordinance on constitutional grounds, Frank was found guilty and fined $20.00. On appeal to the Criminal Court of Baltimore and a trial de novo, Frank was again found guilty and fined $20.00.

Appellant in **Frank** raised his constitutional objections to the ordinance (Frank Record 27) by a "Motion to Dismiss" (similar to the Motion to Quash in the instant case) on the ground that the ordinance under which he was charged violated the Constitution of Maryland and "the Fourth and Fourteenth Amendments to the Constitution of the United States."

The Motion to Dismiss in **Frank** was "Denied" without opinion by the trial judge.

After all of the evidence was in, the appellant in **Frank** (R 40) filed a "Motion for Verdict of 'Not Guilty' " (similar to the Motion to Set Aside the Verdict in the instant case—which is a proper pleading under North Carolina law, **State v Godwin, 5 Iredell 401, State v Best, 111 NC 638, 643, 15 SE 930),** setting out substantially the same constitutional grounds as in the Motion to Dismiss.

The Motion for Verdict of "Not Guilty" in Frank was also "Denied" without opinion by the trial judge.

The Court of Appeals of Maryland in **Frank** denied appellant's "Petition for Certiorari to the Criminal Court of Baltimore" without opinion and without any docket entries (Frank Record 43, 44.)

While the Supreme Court of North Carolina wrote an opinion in the instant case, it sustained the actions of the trial Judge in his denial without opinion of the Motion to Quash and the Motion to Set Aside the Verdict, which raised the con-

stitutional questions in the instant case much more extensively than constitutional questions were raised in the Motion to Dismiss and the Motion for Verdict of "Not Guilty" in the **Frank Case.**

State Supreme Court Said It Was "Considering the Merits"

At the outset of its opinion in the instant case, the Supreme Court of North Carolina said:

> "Before pleading to the merits in the Superior Court, defendants renewed their motions to quash as originally made in the Municipal-County Court. The motions made in apt time were overruled by the court.
>
> **"Before considering the merits of the cases,** we must ascertain if defendants were properly called upon to answer the criminal charges leveled against them. The motions to quash assign three reasons why defendants should not be called upon to answer the allegation that they violated the criminal laws of the State of North Carolina.
>
> "S. v Cooke, 246 NC 518, 98 SE 2d 885, is relied upon for two of the reasons assigned. An examination of that case is necessary **to assay the merits of the motions."** (Emphasis added—R 108)

Of course, this Court is not bound by the statement of the North Carolina Supreme Court that "the motions to quash assign three reasons why defendants should not be called upon to answer the allegation that they violated the criminal laws of the State of North Carolina." Under **Staub v City of Baxley, Allied Stores of Ohio v Bowers, and Brown v Western Railway of Alabama, supra,** "this Court must determine for itself" what the allegations and reasons were in the Motion to Quash and their sufficiency to constitute a defense under the Federal Constitution and laws.

Similarity to Irvin v Dowd

The Supreme Court of North Carolina having written that it was **"considering the merits of the cases"** and that it was about **"to assay the merits of the motions"** to quash ap-

pellee State's claim in its Motion to Dismiss that the Motion to Quash and the Motion to Set Aside the Verdict were not decided upon their merits would seem to find no support in the opinion of the Supreme Court of North Carolina.

But this claim of appellee does suggest a similarity in this connection between the instant case and **Irvin v Dowd, ——US ——, 3 L ed 2d 900, 907, 79 S Ct 825,** where this court said of an opinion of the Indiana Supreme Court:

> "The court's statement that its conclusion on the escape point made it 'unnecessary' to consider the constitutional claim was not a holding that the judgment was rested on that ground. Rather, the court proceeded to determine the merits 'because of the finality of the sentence' and 'to satisfy ourselves that there is no miscarriage of justice.' In this way, in our view, the State Supreme Court discharged **the obligation which rests upon 'the State courts, equally with the courts of the Union, . . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . .'** Robb v Connolly, 111 US 624, 637, 28 L ed 542, 546, 4 S Ct 544." (Emphasis added)

On Page 115 of the Record, the Supreme Court of North Carolina said in its opinion: **"Defendants moved to set aside the verdict of guilty."** There follow the rest of Page 115, all of Pages 116 and 117, and almost half of Page 118, in which the Supreme Court of North Carolina discusses the Motion to Set Aside the Verdict, concluding with the sentence: **"Defendants were not, as a matter of right, entitled to have the verdict set aside."**

Appellants believe that this is a clear approval on the merits of the trial court's denial of the Motion to Set Aside the Verdict.

Legal Meaning of Expression "The Merits"

The Supreme Court of North Carolina having spoken of **"the merits"** in describing its disposition of the questions before it, this expression should be understood to have been used

with its normal legal meaning and significance. Compare **Bell v Hood, 327 US 678, 90 L ed 939, 66 S Ct 773,** where the meaning of the expression, **"the merits,"** is discussed in a jurisdictional setting, in connection with rulings on a pleading alleging rights claimed under the Constitution of the United States.

Appellants respectfully suggest and believe that this Court has jurisdiction to reach the merits of this case, either under 28 USC 1257 (2) or under 28 USC 2103.

ARGUMENT II

THE CASE ON THE MERITS

A. THE SUPREMACY CLAUSE QUESTIONS

(1) Does the State policy of making Gillespie Park Golf Course "a private club for members and invited guests only" (R 44, 75) collide unconstitutionally with the policy of Federal law that this facility must provide "the greatest degree of public usefulness"? (See Appendix 3-g, Page 94.) Is the State's criminal trespass statute (GS 14-134) unconstitutional as applied in this case, because it seeks to implement such a State policy that is in direct conflict with Federal law?

When this golf course was first constructed, 65% of the cost came from Federal funds provided by the **Emergency Relief Appropriation Act of 1939, of June 30, 1939, 53 Stat 927, Chap 252. (See Fact No. 4, supra.)** Section 11 (c) and Section 14 of this Act provide the following:

"Sec. 11 . . . (c) No non-Federal project shall be undertaken or prosecuted under appropriations under this joint resolution (except under section 4) unless and until the sponsor has made a written agreement to finance such part of the entire cost thereof as the head of the agency, if the agency administers sponsored projects, determines under the circumstances is an adequate contribution taking into consideration the financial ability of the sponsor . . . "

"Sec. 14. Agencies receiving appropriations under this joint resolution are authorized to prescribe such rules and regulations as may be necessary to carry out the purposes for which such appropriations are made."

Section 28 of the Act provides sanctions against "discrimination on account of race" and also against depriving "any person of any of the benefits to which he may be entitled under any such appropriations . . ."

Pursuant to said Section 14 the W. P. A. adopted the **Manual of Rules and Regulations, Federal Works Agency, Work Projects Administration (Library of Congress Book Number HD-3881, .A58.)** Photographic reproductions of pages from that Manual, pertinent to this case, are attached hereto as Appendixes 3 (a) to 3 (i) inclusive. The following quotations are examples of the Federal policy that this golf course, built with Federal funds, was to be fully public and not private:

"The Work Projects Administration is charged with the responsibility of providing work for needy persons on useful **public projects.** It carries out this responsibility by operating, or cooperating in the execution of, projects sponsored by public bodies **which are designed to provide additional facilities, activities, or services of benefit to the general public."** (Emphasis added. See Appendix 3-g.)

"The Work Projects Administration, in cooperation with sponsors, is responsible for selecting projects for operation **which offer the greatest degree of public usefulness** consistent with the employment of certified workers in the area." (Emphasis added. See Appendix 3-g.)

"The efficiency of WPA project operations and the **usefulness of completed facilities to the general public** are dependent upon the adequacy of plans and specifications furnished by the project sponsor and the timely fulfillment of obligations either assumed by the sponsor or which the sponsor may reasonably be expected to assume **in view of the public benefit accruing to the community.** (Emphasis added.—Appendix 3-h, Page 95.)

"A sponsor of a WPA project must have legal authority

to engage in the work embraced by the project and in the area covered. **The sponsor shall further be responsible for the continued public use or benefit of the facility or service provided by the project sponsored.**" (Emphasis added. See Appendix 3-i, Page 96.)

These rules and regulations, of course, have the force of law. **Lilly v Grand Trunk Western Railroad Company, 317 US 481, 488, 87 L ed 411, 416, 63 S Ct 347.** In **Ivanhoe Irrigation District et al. v McCracken, 357 US 275, 295, 2 L ed 2d 1313, 1327, 78 S Ct 1174,** it is said:

> **"Also beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges."**

In **Clearfield Trust Company v United States, 318 US 363, 366, 367, 87 L ed 838, 841, 63 S Ct 573,** this Court said:

> **"When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. This check was issued for services performed under the Federal Emergency Relief Act of . . . 1935, 49 Stat 115, c 48. The authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of Pennsylvania or any other state . . . The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources . . . In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards."**

The State's Use of Its Criminal Sanctions to Enforce State Policy in Conflict with Pertinent Federal Policy

In **Miller v Arkansas, 352 US 187, 190, 1 L ed 2d 231, 233, 77 S Ct 257,** a contractor bid upon work at an Air Force Base in Arkansas, the bid was accepted by the United States, and the contractor began work on the project.

The State of Arkansas prosecuted the contractor "for

submitting a bid, executing a contract, and commencing work as a contractor in the State of Arkansas without having obtained a license under Arkansas law . . ."

The contractor was found guilty and fined, and the trial court's judgment was affirmed by the Supreme Court of Arkansas.

On appeal to this Court the judgment was reversed because of the **"conflict between this license requirement which Arkansas places on a federal contractor and the action which Congress and the Department of Defense have taken to insure the reliability of persons and companies contracting with the Federal Government."**

Appellants respectfully suggest that likewise in the instant case there is a similar conflict between the requirements of North Carolina that persons seeking to play golf on Gillespie Golf Course must meet the membership conditions of "a private club" and the Federal law and policy that this golf course, built with Federal funds pursuant to a Federal statute and its authorized rules and regulations, must be operated so as to **"offer the greatest degree of public usefulness."** (See Appendix 3-g.)

In the **Ivanhoe Case,** supra, this Court said:

> **"Article VI of the Constitution, of course, forbids state encroachment on the supremacy of federal legislative action."** (357 US at 295.)

(2) Can the State constitutionally avoid or vitiate the agreement made with the United States by its agencies, City of Greensboro and Greensboro City Board of Education, that during its useful life this golf course would be operated **"for the use and benefit of the public"** and would not **"be leased, sold, donated, or otherwise disposed of to a private individual or corporation, or quasi-public corporation"?** (See Fact No. 4, supra) Is the State's criminal trespass statute (GS 14-134) unconstitutional as applied in this case, because it seeks to implement avoidance by the State's agencies of their agreement with the United States that this golf course would thus be operated?

It seems to be settled that **"the paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms in an enactment of Congress. See Railway Employees' Dept. A. F. of L. v Hanson, 351 US 225, 232, 100 L ed 1112, 1130, 76 S Ct 714." See Local 24 etc. v Oliver, —US—, 3 L ed 2d 312, 321, 79 S Ct 297.**

In United States v County of Allegheny, 322 US 174, 183, 88 L ed 1209, 1217, 64 S Ct 908, this Court said:

> **"The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state."**

That there was such an agreement as indicated in this question No. (2) under the Supremacy Clause is clear from the opinion of Judge Hayes which the State Supreme Court said was before the State courts, and the facts appearing in that opinion which the State Supreme Court said were known to the State courts. (See Fact No. 4, supra.) Besides, since the agreement was required by Federal law, it will be presumed that the agreement was made. **Southern Pacific Company v Steward, 245 US 359, 362, 62 L ed 345, 38 S Ct 130.**

It would be an anomaly, if flagrant violation of the agreement with the United States by appellee State's agencies could be made the basis for prosecution and punishment of citizens by the State for the exercise of rights vouchsafed to the public by such agreement. In this connection the City of Greensboro freely admitted in its brief before the Court of Appeals for the Fourth Circuit (See Appendix 1-a) that it violated this agreement from the first day the golf course was opened until 1949.

The Federal Agreement as Basis for Bona Fide Belief of a Right to Play Golf on Gillespie Park Golf Course

Appellants believe that this agreement on the part of

appellee State's agencies with the United States gave to citizens as members of the public an absolute right to be free from the membership requirements of "a private club" in playing golf on this golf course. However, the Supreme Court of North Carolina said in its opinion in this case (R 111) that it was a sufficient defense to the crime of trespass "for defendants to establish that they entered upon a **bona fide** belief of a right to so enter, which belief had a reasonable foundation in fact."

It would seem to appellants that this solemn agreement by the State's agencies with the United States would provide an unassailable basis for their "bona fide belief of a right" to play golf on this golf course, as well as for an unquestionable "reasonable foundation in fact" for such belief. Certainly, it would seem unreasonable for the jury and the trial court to find otherwise, especially since those jurors who had played on this golf course, upon their voir dire examinations, "stated **very frankly and freely in open court that they had played on this course without any requirements except the payment of greens fees.**" (R 93)

This being an agreement with the United States, under **U. S. v County of Allegheny, supra,** its effect to give appellants such "a bona fide belief of a right" to play golf on this course presents a question of Federal law **"not controlled by the law of any state;"** and under **Ashcraft v Tennessee, supra,** the examination of this question by this Court **"cannot be foreclosed by the finding of a court or the verdict of a jury, or both."** See also **Haley v Ohio, 332 US 596, 599, 92 L ed 224, 228, 68 S Ct 302.**

Especially should this be true, appellants believe, in view of the fact, set forth in Judge Hayes' opinion (See Fact No. 10, supra,) that **"The brief filed by the City of Greensboro . . . lends powerful weight to the inference that the lease was resorted to in the first instance to evade the City's duty not to discriminate against any of its citizens in the enjoyment in the use of the park."**

(3) Can the State constitutionally make a crime out of

identical acts and conduct which the Federal Courts have held to be protected by the Constitution of the United States, and make lawful acts of the State's agencies which the Federal Courts have held to have been "unlawfully" committed against the "constitutional rights" of the appellants? Is the State's criminal trespass statute (GS 14-134) unconstitutional as applied in this case, because it renders ineffectual the judgments of United States Courts?

In their Motion to Set Aside the Verdict the appellants set out **verbatim** the Declaratory Judgment of the United States District Court for the Middle District of North Carolina in the following allegations (R 92):

"II. That the Supremacy Clause (Article VI) of the Constitution of the United States requires this Court to give effect to and to enforce the judgments of the United States Courts covering the subject matter of this prosecution, particularly the 'Decree and Injunction' of the United States District Court for the Middle District of North Carolina, in Civil Case No. 1058, in which these defendants were plaintiffs and Gillespie Park Golf Club, Inc., was one of the defendants, covering the identical acts and conduct charged by the State to be a crime of trespass in this case, said 'Decree and Injunction' reading in part as follows:

"'It is now ordered, adjudged and decreed that defendants have unlawfully denied the plaintiffs as residents of the City of Greensboro, North Carolina, the privileges of using the Gillespie Park Golf Course, and that this was done solely because of the race and color of the plaintiffs, and constitutes a denial of their constitutional rights, and unless restrained will continue to deny plaintiffs and others similarly situated.'.

"That the State of North Carolina and its Jury in this case undertake to find to be criminal the identical acts and conduct which said 'Decree and Injunction' holds to be protected by the Constitution of the United States, and further undertake to find to have been lawfully done, that which said 'Decree and Injunction' holds was 'unlaw-

fully' done, and that to permit said verdict to stand and to punish these defendants on the basis of said verdict would nullify and render ineffectual the rights of these defendants which said 'decree and injunction' holds to be guaranteed and protected by the Constitution and laws of the United States, including the due process and equal protection clauses of the 14th Amendment."

The appellee State did not answer or controvert these allegations in any way.

The general principle of the supremacy of decisions of the Federal Courts upon Federal matters and rights was set forth by this Court in **Cooper v Aaron, 358 US 1, 18, 3 L ed 2d 5, 16-17, 78 S Ct 1401**, as follows:

"Article VI of the Constitution makes the Constitution the 'supreme Law of the Land.' In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as 'the fundamental and paramount law of the nation,' declared in the notable case of Marbury v Madison (US) 1 Cranch 137, 177, 2 L ed 60, 73, that 'It is emphatically the province and duty of the judicial department to say what the law is.' This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."

Appellee seems to concede, at least by implication, that it would be bound by the above-quoted Declaratory Judgment of the Federal Court if it had in any way been a party to the proceedings. "The Court will further note," appellee says on Page 4 of its Motion to Dismiss in this Court, "that the State of North Carolina was **in no manner** made a party to this civil action in the Federal Court." (Emphasis added.) This same concession seems to be implicit in the State Supreme Court's opinion (R 116):

"The State challenges the assertion that there has been an attack, collateral or otherwise, on the judgment ren-

dered by the District Court. It maintains that the questions to be answered are these: (1) Should a court take judicial knowledge of facts found at another time by another court in another action; and if this question be answered in the affirmative, (2) is the State, in a criminal prosecution, concluded by facts found in a civil action **to which it is not a party?"** (Emphasis added)

The first question, of course, appellants believe, was beside the point, because appellants had alleged **verbatim** the Declaratory Judgment of the Federal Court, and appellee State had not answered or denied or controverted the allegations in any way.

The State Was Constitutionally a Party to the Federal Court Case.

As to the second question, appellants believe that the State was constitutionally a party to the **Simkins Case** under the principles announced and confirmed by this Court in **Cooper v Aaron, supra.** The State of North Carolina occupies the same relationship constitutionally to the **Simkins Case** that the State of Arkansas occupied to **Cooper v Aaron.** In both cases Negro plaintiffs had sued agencies of the State to vindicate constitutional rights. In both cases the Federal Courts had issued Declaratory Judgments establishing those constitutional rights. The State was not a party by name in either case.

Under these circumstances, in his concurring opinion in **Cooper v Aaron,** Mr. Justice Frankfurter said: "Accordingly, while Arkansas is not a formal party in these proceedings and a decree cannot go against the State, **it is legally and morally before the Court." (358 US at 22)** (Emphasis added)

Can there be any doubt that the position of this Court would have been the same in **Cooper v Aaron** if, instead of being faced with a situation where the Governor of the State had called out the National Guard to prevent the Negro children from exercising their "constitutional rights" which had been duly declared by the Federal Courts, this Court had been faced with a situation where the State's prosecutor had waited until the Negro children went upon the grounds

of Central High School (after some representative of the State had told them to stay away or to leave after they had entered), and then thrown the children in jail on warrants charging a violation of the State's criminal trespass statute? (See **Thomason v Cooper, supra.**)

Appellants believe that such is the exact situation presented by the instant case. The warrants involved in this case were drawn and appellants were arrested under them after the Declaratory Judgment quoted above had been issued, and after it had been affirmed by the Court of Appeals for the Fourth Circuit, establishing (as the Federal Courts are authorized to do by the Federal Declaratory Judgment Act, 28 USC 2201) that the identical acts and conduct charged by the State to be a crime in this case represented the "constitutional rights" of appellants under the Constitution of the United States, and also establishing that these "constitutional rights" had been "unlawfully denied" to appellants by appellee State's agencies.

The State thus by its convictions and sentences in this case as effectively thwarts and renders ineffectual the Declaratory Judgment of the Federal Courts as the State's National Guard troops had done in **Cooper v Aaron.** Appellants believe that the Supremacy Clause forbids such action by any State. " **'It is of the very essence of supremacy to remove all obstacles to its action within its sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence.'** " **Public Utilities Commission v United States, 355 US 534, 544, 2 L ed 2d 470, 478, 78 S Ct 446.**

In **Cooper v Aaron, supra,** this Court said:

"If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, **and destroy the rights acquired under those judgments,** the constitution itself becomes a solemn mockery . . . ' " (358 US at 18) (Emphasis added.)

It cannot be disputed that the State statute (GS 14-134), as construed and applied in this case, undertakes in the Guilford County Court House to make a crime out of the identical

acts and conduct which, across the street in the Federal Court House, the Federal Courts had already held to represent the "constitutional rights" of appellants, protected by the Constitution of the United States from infringement by the State.

Appellants believe that the Supremacy Clause forbids the exertion of State power in the form of the convictions and jail sentences disclosed by the record in this case, in the teeth of the previously exerted Federal power in the form of the Declaratory Judgment of the Federal Court. In **Garner v Teamsters, etc, 346 US 485, 500, 98 L ed 228, 245, 74 S Ct 161,** this Court said:

> **"We conclude that when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land, and cannot be curtailed, circumvented or extended by a State procedure merely because it will apply some doctrine of private right. To the extent that the private right may conflict with the public one, the former is superseded."**

Question of Offering the Federal Records in Evidence

While appellants believe that sufficient of the Federal Court proceedings were in the record and before the State Courts, the appellee State makes quite a point of this question in its Motion to Dismiss (See Pages 11 and 23). The State Supreme Court also makes a point of this contention in its opinion (R 115) in these words: **"Although defendants had the record in that case identified,** they did not offer it in evidence. It is not a part of the record presented to us. **Our knowledge of the facts in that case is limited to what appears in the published opinion."** (Emphasis added.)

The Record itself at Page 92 shows that the State Supreme Court inadvertently overlooked the fact that the Federal Court's Declaratory Judgment **was "a part of the record presented"** to that Court.

As to the Opinion of the Federal District Court, the State Supreme Court itself acknowledges that that Opinion was be-

fore the State Courts and that the State Courts **had "knowledge of the facts" contained in that opinion.** (R 115).

The Record also shows that the Federal District Court's Finding of Fact No. 33 (R 94) and Finding of Fact No. 30 (R 95-96), which were two of the key Findings of Fact, **were "a part of the record presented"** to the State Supreme Court.

But, generally as to the question of offering the Federal Court record in evidence, the simple truth is that the record was in fact offered in evidence and its admission refused. On Page 79 of the Record appears the following:

"Exception No. 22:

"Mrs. Kennedy: If your Honor please, we'd like, if possible, to have a ruling on whether or not these would be admissible.

"Court: I am going to sustain the objection as to those two Exhibits, that is No. 6 and No. 7.

"Exception No. 22."

Appellants attach hereto photographic reproductions of Pages 58 and 59, marked Appendix 4 (a) and Appendix 4 (b), of the original "Transcript of Testimony" furnished to counsel for appellants in the State trial court by the Official Court Reporter in the trial of this case.

By some quirk of inadvertence the identification of the Federal Records as "Defendants' Exhibits 6 and 7", as shown by said Appendixes, was omitted entirely from the record which went to the Supreme Court of North Carolina on appeal.

On Page 14 of appellants' brief before the Supreme Court of North Carolina, the true fact was called to the attention of the Court by the following: "The Court erred in refusing to admit defendant's Exhibits 6 and 7, as set out in Exception No. 22. These exhibits were the decrees, the findings of fact, conclusions of law and opinion of the Federal District Court in the **Simkins** case and the opinion of the Court of Appeals, Fourth Circuit, in the same case."

Exercising its wide discretion to go outside the record for vital information concerning the true facts as to what transpired in the lower court (See **Mason v Commissioners of Moore, 229 NC 626, 627, 51 SE 2d 6, and Aycock v Richardson, 247 NC 234, 100 SE 2d 379,),** the Supreme Court of North Carolina went outside the record **(it could not be found in the record)** to find, with reference to the records of the Federal Court proceedings, that **"the defendants had the record in that case identified . . ."**

But by some quirk of inadvertence the Supreme Court of North Carolina failed to notice that the Federal Court records were identified as "Defendants' Exhibits 6 and 7," and therefore erroneously came to the conclusion that appellants did not offer these records in evidence.

In view of the North Carolina Supreme Court's wide discretion (See **Williams v Georgia, 349 US 375, 99 L ed 1161, 75 S Ct 814)** to go beyond the record to get at the truth, appellants do not believe that, if offering these Federal Court records in evidence should become a material issue, the above-mentioned quirks of inadvertence will render this Court powerless itself to look at the true facts in this case. Appellants could not call this to the attention of the State Supreme Court because no petition for rehearing is permitted in a criminal case in the Supreme Court of North Carolina. (See **State v Council, 129 NC 371 (511), 39 SE 814,** and Certificate of the Clerk of the Supreme Court of North Carolina (R 139).

Nor do appellants believe that on oral argument, the representatives of appellee will tell this Court that the true facts about offering the Federal Court records in evidence are other than as herein set forth.

B. THE FOURTEENTH AMENDMENT QUESTIONS

I. The "Equal Protection of the Laws" Questions

(1) Does the record show racial discrimination against appellants in the use of Gillespie Park Golf Course (a) by the "facts" in the "published opinion" of the Federal Court, which the State Supreme Court said were known to the State courts?

or (b) by the Declaratory Judgment of the Federal Court, which was alleged **verbatim** in the Motion to Set Aside the Verdict and which was not denied or controverted by the appellee State in any way? or (c) within the "rule of exclusion" established by such cases as **Hernandez v Texas, 347 US 475, 98 L ed 866, 74 S Ct 667, and Eubanks v Louisiana, 356 US 584, 2 L ed 2d 991, 78 S Ct 970?** Is the State's criminal trespass statute (GS 14-134) unconstitutional as applied in this case, because it seeks to implement and make good such racial discrimination?

The Opinion of the United States District Court for the Middle District of North Carolina (149 Fed Supp 562) and that Court's Declaratory Judgment (R 92) show abundantly and clearly racial discrimination against appellants. They speak for themselves.

The **"rule of exclusion"** by which racial discrimination may be proved was set forth in **Hernandez v Texas, supra,** as follows (347 US at Pages 480, 481):

> "Having established the existence of a class, petitioner was then charged with the burden of proving discrimination. To do so, he relied on the pattern of proof established by Norris v Alabama, 294 US 587, 79 L ed 1074, 55 S Ct 579. In that case, proof that Negroes constituted a substantial segment of the population of the jurisdiction, that some Negroes were qualified to serve as jurors, and that none had been called for jury service over an extended period of time, was held to constitute prima facie proof of the systematic exclusion of Negroes from jury service. This holding, sometimes called the **'rule of exclusion'**, has been applied in other cases, **and it is available in supplying proof of discrimination against a delineated class."** (Emphasis added.)

> "To rebut the strong prima facie case of the denial of the equal protection of the laws guaranteed by the Constitution thus established, the State offered the testimony of five jury commissioners that they had not discriminated against persons of Mexican or Latin American descent

in selecting jurors. They stated that their only objective had been to select those whom they thought were best qualified. This testimony is not enough to overcome the petitioner's case."

The record shows that appellants are Negroes (R 32, 91) The 1950 Census shows that Negroes constitute 25 per cent of the population of Greensboro, North Carolina.* Three colleges (The North Carolina Agricultural and Technical College, Immanuel Lutheran College, and Bennett College)*, whose students and faculties are predominantly Negroes are located in Greensboro. The Federal Court's Opinion (149 Fed Supp at 563) shows that one of the appellants is "a dentist and practicing his profession in Greensboro." The Federal law under which the golf course was built requires (See Appendix 3-g) that this golf course must provide "the greatest degree of public usefulness."

City of Greensboro candidly conceded in its brief before the United States Court of Appeals for the Fourth Circuit that, from the time this golf course was built about 1940 **"until 1949, the City operated the golf course exclusively for white citizens."** (See Appendix 1-a)

Appellee State's witness, Clyde Bass, the Assistant Pro in charge, testified: "To my knowledge, no Negroes have ever played at the Gillespie Park Golf Course before this date. Some Negroes have presented themselves before this date to play, but none have played to my knowledge." (R 45).

The trial judge sustained the State's objection to the question: "Why didn't they play?" (R 45)

Appellants believe that the above presents clear "prima facie proof of the systematic exclusion of Negroes from" Gillespie Park Golf Course and of racial discrimination against the appellants. Especially, in the opinion of appellants, should the "rule of exclusion" be applied to supply proof of racial discrimination in a case like this, since the State courts have

*See Robinson, "The North Carolina Guide," (1955), University of North Carolina Press, Pages 204, 205.

by their rules of evidence closed the mouths to the truth of the operators of the golf course, they being the persons who know more about the racial discrimination which they had practiced than anybody else. (See Record 45, 48, 78) Appellants discuss this phase of the case below under the Due Process Questions.

In this connection, it is revealing that, on Page 13 of its brief before the State Supreme Court, appellee says: "These exceptions relate to the exclusion of certain evidence by the trial court. **The question of whether or not Negroes had previously been refused to play on the golf course is utterly immaterial.**" (Emphasis added.) These actions of the trial court in excluding evidence of racial discrimination were sustained by the State Supreme Court: "The exceptions to the admission and exclusion of evidence have been examined. We have found none which indicates prejudicial error or appears to warrant discussion." (R 118)

It thus appears that, but for the **"rule of exclusion"** established by the decisions of this Court for the proof of racial discrimination, the State rules of evidence in this case would effectively prevent appellants from proving their constitutional right to be free from racial discrimination in the use of Gillespie Park Golf Course.

Pattern of Racial Discrimination Consistent with Everything and Inconsistent with Nothing in This Case

Everything in this case matches and is consistent with the pattern of racial discrimination, while nothing is inconsistent with that pattern. For instance, if racial discrimination had not been practiced against appellants in this case, and if "the question of racial discrimination in the use of the golf course was not involved in this case," as appellee says on Page 5 of its Motion to Dismiss in this Court, then how does appellee explain the facts of common knowledge (See Appendices 2-a to 2-g), which show that on the day before the Federal Court's injunction became effective forbidding any further racial discrimination at the golf course, after the club house had burned, the City collected the insurance money and appellee State's

agencies closed down the golf course and have never operated it for a single day since the Federal Court's injunction went into effect?

The pattern of racial discrimination in this case makes clear the truth of the finding in the Federal Court's Opinion, (149 Fed Supp at 563), which the State Supreme Court said the State courts had knowledge of: "The evidence does clearly show that white people were allowed to play by paying greens fees without any questions and without being members. When Negroes asked to play, they were told they would have to be members before they could play and it clearly appears that there was no intention of permitting a Negro to be a member or to allow him to play, solely because of his being a Negro."

The pattern of racial discrimination also makes clear the truth of the Federal Court's finding in said Opinion (149 Fed Supp at 565) that the brief of the City of Greensboro in that case "lends powerful weight to the inference that the lease was resorted to in the first instance to evade the City's duty not to discriminate against any of its citizens in the enjoyment in the use of the park."

Since Gillespie Park Golf Course was one of the busiest in the Greensboro area (See Appendix 2-e), only the pattern of racial exclusion of Negroes can explain how it happened, as found by the Federal District Court in Finding of Fact No. 28 (See Page 73 of appellants' Statement As To Jurisdiction): **"That about seven years have expired under the leases and that during the time a total cumulative membership did not exceed 162 persons, and not more than 60 persons have membership in the corporation at this time."** This finding makes understandable the testimony of the Assistant Pro, Clyde Bass: "I know most of the members who present themselves to play." (R 44) This would obviously have been impossible if all of the people playing at Gillespie Park Golf Course had to be members, especially since he testified that he had worked at the golf course only "about 8 or 9 months" (R 44).

Only the pattern of racial discrimination can explain how the City of Greensboro could say in its resolution terminating

the lease of its "private club" (See appendix 2-g.): "Whereas, the Gillespie Park Golf Club, Inc. was created a non-profit, non-stock corporation and **no person, other than the City, has invested any funds in the corporation or in the Golf Course and its equipment;** and the Golf Club **has operated solely on funds derived from the use of the Golf Course."** (Emphasis added.) Especially is this so in view of the testimony of the president of Gillespie Park Golf Club, Inc., which appellee State seems to take at face value (See Page 8 of Motion to Dismiss) in appellee's statement that "the corporation invested about $100,000 in improvements and expanded it into an 18-hole golf course, and, further, they built a club house at a cost of about $5,000."

But the City's resolution is perfectly consistent with Finding of Fact No. 29 of the Federal District Court (See Page 74 of appellants' Statement As To Jurisdiction) "that the members and directors of the corporation have not invested a single cent of their own money in the corporation, while at the same time some of them have profited through compensation as officers and employees of the corporation." The State Supreme Court also seems to take at face value the testimony of the golf corporation's president: "There is evidence that lessee had, during its term, expended more than $100,000 in enlarging the course from a nine-hole course to an eighteen-hole course, constructing a club house, and making other improvements." (R 112)

So far as appellants have been able to discover, there is not a single fact or circumstance in this case which points to the absence of racial discrimination against appellants. If there are such facts or circumstances, surely appellee State will point them out in its brief. **No State witness denied racial discrimination.**

(2) Does the **"lack of standards in the license-issuing practice"** for playing on Gillespie Park Golf Course constitute "a denial of equal protection" without regard to racial discrimination, within the meaning of such cases as **Niemotko v Maryland, 340 US 268, 273, 95 L ed 267, 271, 71 S Ct 325?** Is the State's criminal trespass statute (GS 14-134) unconstitu-

tional as applied in this case, because it seeks to make lawful such "lack of standards"?

In **Niemotko** this Court "examined the licensing systems by which local bodies regulate the use of their parks and public places." (340 US at Page 271) This Court said:

> **"In the instance case we are met with no ordinance or statute regulating or prohibiting the use of the park; all that is here is an amorphous 'practice,' whereby all authority to grant permits for the use of the park is in the Park Commissioner and the City Council. No standards appear anywhere; no narrowly drawn limitations; no circumscribing of this absolute power; no substantial interest of the community to be served." (340 US 271-272)**

And this Court held in **Niemotko:**

> "It thus becomes apparent that **the lack of standards** in the license-issuing 'practice' renders that 'practice' a prior restraint in contravention of the Fourteenth Amendment, and that the completely arbitrary and discriminatory refusal to grant the permits was **a denial of equal protection.** Inasmuch as the basis of the convictions was the lack of the permits, and that lack was, in turn, due to the unconstitutional defects discussed, the convictions must fall." (Emphasis added.)

In his concurring opinion in **Niemotko,** Mr. Justice Frankfurter said:

> "The vice to be guarded against is arbitrary action by officials. **The fact that in a particular instance an action appears not arbitrary does not save the validity of the authority under which the action was taken."** (340 US at 285—Emphasis added.)

There is present here, in refusal to grant permission to appellants to play on the golf course, as this Court held in **Niemotko, a "lack of standards in the license-issuing"** authority entrusted to Gillespie Park Golf Club, Inc., concededly an agency of the State. "No standards appear anywhere"

and "no narrowly drawn limitations" appear in this case for granting permission to play on the Gillespie Park Golf Course, any more than such standards or limitations appeared in **Niemotko, supra.**

The State Supreme Court quoted with approval excerpts from the trial court's charge to the jury, such as: "'. . . the Gillespie Golf Club, Inc., by leasing the land from the City of Greensboro to use as a golf course was subjected to the same obligations as the City of Grensboro would have been had it operated the golf course itself.' " (R 113) But, under **Niemotko** and other cases cited in it, the City of Greensboro was obligated to establish **"standards"** and **"narrowly drawn limitations"** for the use of the golf course. Where do we find any such **"standards"** or **"narrowly drawn limitations"** to govern the granting of permission to play on Gillespie Park Golf Course? There are none!

The by-laws of Gillespie Park Golf Club, Inc. provided in Article 1, Section 2 (R 73): "The golf course and its facilities shall be used only by members, their invited guests, **members in good standing of other golf clubs,** members of the Carolina Golf Association, pupils of the Professional and his invited guests." (Emphasis added.)

The arbitrary manner in which this section of the by-laws was used is shown by the fact that, when appellants, who were members in good standing of Nocho Park Golf Club, appeared and sought permission to play, the provision in the by-laws which says "members in good standing of **other golf clubs**" (Emphasis added.) was interpreted and administered, without any amendment as provided in Article 5, Section 1 (R 75), to read: "members in good standing of other golf clubs which are members of the Carolina Golf Association." (R 76, 77). This expansion of the by-laws by interpretation was approved by the trial judge in his charge to the jury (R 87, 88).

Appellee says in its Motion to Dismiss: "Appellants are subject to the same eligibility conditions as any other race," meaning it seems that some white people might not meet the "private club" conditions which applied to Gillespie Park Golf Course. The answer to that suggestion is the same as that

given by this Court to a similar suggestion in **Shelley v Kraemer, 334 US 1, 22, 92 L ed 1161, 1185, 68 S Ct 836:**

> "It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. **Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."** (Emphasis Added.)

Appellee also emphasizes in its Motion to Dismiss (Page 8), as does the State Supreme Court in its opinion (R 114), the trial court's charge to the jury that all seeking to play on the golf course must comply "with the reasonable rules and regulations for the operation and maintenance and use of the golf course," and that nobody could be made "to comply with any unreasonable rules and regulations." The difficulty with this contention is that "no standards appear anywhere; no narrowly drawn limitations" **(Niemotko v Maryland, supra)** to govern either the managers of the golf course in granting or withholding permits to play golf, or to govern or guide the jury in its determination of what is "reasonable" or "unreasonable." For, it was said in **Niemotko:**

> "It is quite apparent that any disorderly conduct which the jury found must have been based on the fact that appellants were using the park without a permit, although, as we have indicated above, there **is no statute or ordinance prohibiting or regulating the use of the park without a permit."** (Emphasis Added.)

That the managers of Gillespie Park Golf Course did not consider themselves bound by any "standards" or "narrowly drawn limitations" is shown by the testimony of the president of Gillespie Park Golf Club, Inc., when he said: **"We set up our own rules . . . We operated completely on our own. The City had nothing whatever to do with it." (R 76)**

In addition Section 1 of Article 5 of the by-laws of Gillespie Park Golf Club, Inc., said: "Authority for the amending, altering or repealing of the By-Laws shall be vested in the Board of Directors." (R 75) By a two-thirds vote the seven

directors (R 74) could "amend, alter or repeal these By-Laws" at will. (R 75)

There were no "standards" or "narrowly drawn limitations" and "no circumscribing of this absolute power" (See **Niemotko v Maryland, supra**) thus vested in the Board of Directors of Gillespie Park Golf Club, Inc.

What is more, **"the voice of the State most presently speaking to the appellants"** (See **Raley v Ohio, supra, 3 L ed 2d at 1356),** when appellants sought to play this golf course, was Assistant Golf Pro Clyde Bass. Did he tell appellants of any "reasonable rules and regulations for the operation and maintenance and use of the golf course?" He did not. Instead, he **"told them it was a private club for members and invited guest only"** (R 44). No witness testified to the contrary.

The State's agencies, in their zeal to be letter-perfect in excluding Negroes, ran afoul of the Constitution's command of equal protection, without regard to racial discrimination. Appellants feel that in this case, as in **Niemotko, supra,** "the convictions must fall" for "lack of standards in the license-issuing" authority delegated to the managers of the golf course.

II. The "Due Process of Law" Questions

In **Wolf v Colorado, 338 US 25, 27, 93, L ed 1782, 1785, 69 S Ct 1359,** this Court said:

> **"This Clause exacts from the States for the lowliest and the most outcast all that is 'implicit in the concept of ordered liberty.' 302 US at 325**
>
> **"Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society."**

And, in **Bartkus v Illinois, ___US___, 3 L ed 2d 684, 689, 79 S Ct 676,** this Court said:

> **"Decisions under the Due Process Clause require close and perceptive inquiry into fundamental principles of**

our society. The Anglo-American system of law is based not upon transcendental revelation but upon the conscience of society ascertained as best it may be by a tribunal disciplined for the task and environed by the best safeguards for disinterestedness and detachment."

(1) Do the State rules in this case which closed the mouths to the truth of certain key witnesses violate the standards of justice and fundamental fairness which the Due Process Clause of the Fourteenth Amendment commands of the States in criminal prosecutions? Is the State's criminal trespass statute (GS 14-134) unconstitutional as applied in this case, because it seeks to implement and make lawful such impediments to the discovery of truth?

Concurring in **Hawkins v United States, ___ US ___, 3 L ed 2d 125, 130, 79 S Ct 136,** Mr. Justice Stewart said:

"Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice."

In **United States v Reynolds, 345 US 1, 12, 97 L ed 727, 735, 73 S Ct 528,** this Court said:

"The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."

The factual situation under this question and appellee State's attitude toward it are indicated on Page 13 of the State's brief before the Supreme Court of North Carolina in this case, as follows:

"Of course, there was no error in the Court refusing to allow the witness Hughes to be called as an adverse witness . . . This was a matter in the discretion of the Court, and counsel for the defendants have evidently confused Federal practice with State practice."

The question goes deeper than a matter of practice. The witness Hughes was president of Gillespie Park Golf Club,

Inc., and the State had rested its case without calling him as a witness. (R 50) This witness was the same John R. Hughes who testified in the **Simkins Case** in the United States District Court for the Middle District of North Carolina. There Judge Hayes had made Findings of Fact (See Appellants' Statement as to Jurisdiction, Pages 72-74) which showed the crucial nature of the information which this witness held in his bosom:

"21. That the City of Greensboro operated the Gillespie Park Golf Course from 1941 until 1949 for the comfort and convenience of white citizens only.

"22. That on or about February 1, 1949, the plaintiff, Arthur Lee, Jr., together with three other Negro citizens of the City of Greensboro, sought the use of the facilities of Gillespie Park Golf Course and were denied said use.

"23. On or about February 15, 1949, representatives of the Greensboro Men's Club, an organization of Negro citizens of the City of Greensboro, appeared before the City Council of the City of Greensboro and requested that Negro Citizens be given the right to play golf at the Gillespie Park Golf Course in as much as the city provided no facilities for Negro golfers.

"24. That on or about February 17, 1949, a group of Negro citizens of the City of Greensboro appeared before the City Parks and Recreation Commission and requested the use of all of the facilities at the Gillespie Park Golf Course. On March 2, 1949, the City Parks and Recreation Commission adopted a resolution recommending to the City Council of Greensboro 'that the City of Greensboro provide golf facilities for the exclusive use of Negro citizens' and that 'the golf course located off Asheboro Street, now used by White not be used by Negroes.' That the resolution embodying these recommendations was presented to the City Council of Greensboro on March 15, 1949 by John R. Hughes, Chairman of the Greensboro Parks and Recreation Commission and that the recommendations were approved by the City Council on said date.

"25. That the Greensboro Parks and Recreation Commission formulates a park and recreation program for the City

and serves the City in an advisory capacity in the formulation of park and recreation budget and policy.

"26. That the said John R. Hughes who appeared before the City Council on March 15, 1949 became the chief promoter and prime negotiator of the leases involved in this case. That at the first meeting of the Board of Directors of the corporation he was 'authorized and directed to meet with the Greensboro City Council and to have full authority to act on behalf of the corporation in securing a lease of the club house, golf equipment, and as much land as might be leased from the city, and also he 'was further instructed and empowered to contact the Greensboro school board and to negotiate an agreement for the lease of the nine-hole golf course on the school property off of Asheboro Street.' That the said John R. Hughes did in fact appear before the City Council and the School Board and did persuade them to authorize the leases involved in this case, and at all times involved in these negotiations, the said John R. Hughes was chairman of the Greensboro Parks and Recreation Commission.

"27. That the said John R. Hughes who appeared before the City Council on March 15, 1949 became the chief promoter and organizer of the defendant Gillespie Park Golf Club, Inc. That the meetings of the corporation were held in his office and he successively became a director, vice-president, secretary and president of the corporation. That he has been the attorney for the corporation from its inception to the present time.

"28. That about seven years have expired under the leases and that during the time a total cumulative membership did not exceed 162 persons, and not more than 60 persons have membership in the corporation at this time. That no meeting of the membership of the corporation has ever been held during the life of the corporation, and that only the members who are also on the board of directors have any voice in the affairs of the corporation. That the board of directors under the by-laws of the corporation is constituted of seven self-perpetuating members who have the sole power and authority to approve persons for membership and to amend or change

the by-laws. That no formal, recorded vote by the board of directors has ever been taken approving any person or persons as members and no meeting held for this purpose, all members appearing on the roll having been approved by telephone conversations between the Golf Professional and an undetermined number of the members of the board of directors.

"29. That all of the funds which have been paid out for operating the golf course under the leases have ultimately come from income which the City would have received direct except for the existence of the leases, and that the members and directors of the corporation have not invested a single cent of their own money in the corporation, while at the same time some of them have profited through compensation as officers and employees of the corporation. That during the life of the lease, funds of the defendant City of Greensboro, from sources other than the golf course have been invested in the property.

"30. That the leases in this case undertook to turn over to a corporation having no assests or income highly valuable income-producing property belonging to the City and the school board, the chief officer and promoter of said corporation being an official of the city, and the city having no prospect of getting anything from said leases except out of the income which the leased property was already bringing in, and with the city reserving the right to put into the property further investments from other sources than said income and that under these circumstances said corporation was in fact an agency of the city and the school board for the continued maintenance and operation of the golf course for the convenience of the citizens of Greensboro."

Under these circumstances counsel for appellants asked permission of the trial court to call the witness, John R. Hughes, as an adverse witness. This permission was refused. (R 72, 78) Thereupon counsel for appellants called Mr. Hughes as a witness and had him to identify the by-laws of Gillespie Park Golf Club, Inc. (R 72)

Then, on "cross examination" (R 75) the trial court permit-

ted the witness Hughes to make a number of self-serving statements for the golf corporation and its officials. (R 75-76)

On Page 77 of the Record appears this testimony of the witness Hughes: **"I did not testify for my association in the case of Simkins and others against the City of Greensboro, Board of Education and Gillespie Park Golf Club, Inc."**

Then counsel for appellants propounded this query: **"Q. Mr. Hughes, I hold in my hand a document purporting to be a transcript of the testimony in the case." (R 78)**

Immediately following this question, the following appears in the Record at Page 78:

"Mr. Kornegay: Objection.

"Court: Bear in mind that he is your witness.

"Mr. Marsh: I called him under 8-50.

"Court: I told you that you could call him as your witness. I'll be glad to read any statute that you have. The objection is sustained. Exception No. 19."

On Page 79 of the Record the following appears:

"In the Absence of the Jury, Mr. John R. Hughes Made the Following Statement to the Court:

"Mr. Hughes: If your Honor please, I would like to ask the Reporter to read the question and answer which I gave in my testimony, so that we may get the record straight.

"Question Read by Reporter as follows: 'Mr. Hughes, did you testify for your Association in the case of Simkins and others against the City of Greensboro, Board of Education, and Gillespie Park Golf Club, Inc.?'

"Mr. Hughes: In order that there may be no misunderstanding, I did testify in that case, but I was called as an adverse witness for the plaintiffs.

"Court: Do you wish to call Mr. Hughes back to the stand.

"Mr. Marsh: No, your Honor."

The trial court had already ruled that appellants could not prove by this witness what he testified to in the Federal Court proceedings.

Appellants respectfully submit that the appellee State has thus impeded "the discovery of truth" in this case and has thus impeded "as well the doing of justice." **(Hawkins v United States, supra)** Appellants further submit that the State has thus invoked "its governmental privileges to deprive" appellants of a fair opportunity to prove their full defense in this case and that this is "unconscionable" **(United States v Reynolds, supra),** and violates that which "is 'implicit in the concept of ordered liberty' " **(Wolf v Colorado, supra)** and also violates the "fundamental principles of our society" as well as "the conscience of society" **(Bartkus v Illinois, supra.)**

Appellants believe that the same principles apply to the refusal of the trial court to permit appellants to cross examine the State's witnesses as to the reasons why Negroes had not been permitted to play on Gillespie Park Golf Course. (R 45, 48)

Witnesses Hughes, Bass and Edwards, as president and employees, respectively, of the golf corporation, were testifying as to actions taken when they were agents of appellee State itself. (R 96)

(2) The Supreme Court of North Carolina having held for the very first time in this case that this criminal trespass statute (GS 14-134) applies also to **public** lands, and not just to lands **"privately held" (State v Clyburn, 247 NC 455, 458, 101 SE 2d 295),** does the judgment in this case send each of the appellants **"to jail for a crime he could not with reasonable certainty know he was committing" (Scull v Virginia, ___US___, 3 L ed 2d 865, 871, 79 S Ct 838)?**

The rule was stated in **Scull** as follows:

"To sustain his conviction for contempt under these circumstances would be to send him to jail for a crime he could not with reasonable certainty know he was committing. **This Court has often held that fundamental fairness requires that such reasonable certainty exist."** (Emphasis added.)

That citizens are entitled to rely upon decisions of the highest Court of a State which interpret the statutes of the State seems clear. In **National Association for the Advancement of Colored People v Alabama, 357 US 449, 457, 2 L ed 2d 1488, 1497, 78 S Ct 1163,** this Court said:

> "Even if that is indeed the rationale of the Alabama Supreme Court's present decision, such a local procedural rule, although it may now appear in retrospect to form part of a consistent pattern of procedures to obtain appellate review, cannot avail the State here, because petitioner could not fairly be deemed to have been apprised of its existence. Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, **in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.**" (Emphasis added.)

The appellee State seems to claim that the rule of decision by the Supreme Court of North Carolina has always been, and indeed still is that this criminal trespass statute (GS 14-134) applies only to lands **"privately held,"** as was the holding in **State v Clyburn, supra.** On Page 18 of its Motion to Dismiss in this Court appellee says: "The Supreme Court of North Carolina has not changed its rule in interpreting the statute because the evidence showed that the property **was in the possession of a private corporation** even though it was impressed with a non-discriminatory use." (Emphasis added.)

Since federal constitutional rights are involved in this case, this Court will, of course, determine for itself whether this golf course "was in the possession of **a private corporation,**" (Emphasis added.) in determining whether or not appellants had a "justified reliance upon prior decisions" **(NAACP v Alabama, supra)** that this criminal trespass statute did not apply to the public lands involved in this case. In **Niemotko v Maryland, supra,** this Court said: "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but **will reexamine the evidentiary basis on which those conclusions are founded.**" (Emphasis added.)

The facts show that these lands were owned by the City of Greensboro and the Greensboro City Board of Education; that the golf course was built pursuant to Federal law which required that these lands be public; that the City and the Board of Education, in order to induce the United States to pay 65 per cent of the cost, agreed with the United States that these lands would remain public and would not be leased or sold to any private or quasi-public interest; that the golf corporation was an agency of the City and the Board of Education, and Judge Hayes even found that the City's own brief before him "lends powerful weight to the inference that the lease was resorted to in the first instance to evade the City's duty not to discriminate against any of its citizens." (149 Fed Supp at 565)

Under these circumstances, how could any citizen understand "with reasonable certainty" that these lands were "privately held", so as to make the criminal trespass statute (GS 14-134) apply to these lands?

(3) Do the multiple criminal proceedings against appellants in this case reach the areas which the Due Process Clause forbids, such as **"fundamental unfairness"** or **"unduly harassing an accused" (Hoag v New Jersey, 356 US 464, 467, 2 L ed 2d 913, 917, 78 S Ct 829)**, or **"merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time"** (Concurring Opinion in **Brock v North Carolina, 344 US 424, 429, 97 L ed 456, 460, 73 S Ct 349)?**

The facts are clear. The warrants involved in this case constitute the third consecutive original criminal proceeding which appellee State has made appellants defend for playing on this golf course.

The first original proceeding was a set of warrants in the Greensboro Municipal-County Court, charging a criminal trespass upon the property of **"Gillespie Park Golf Course."**

The second original proceeding was a set of indictments in the Superior Court of Guilford County, charging the identi-

cal acts to be a trespass upon the property of **"Gillespie Park Golf Club, Inc."** (R 36-43)

The third original proceeding was the set of warrants in Municipal-County Court which are involved on this appeal. Four of the warrants charged a trespass upon the property of **"Gillespie Park Club, Inc."**

(a) On a de novo trial in the Superior Court of the warrants in the first original proceeding, "the prosecuting officer obtained the permission of the Court to amend the warrants so that they would read or describe the trespass as having been committed on the premises of 'Gillespie Park Golf Club, Inc.' . . ." (See Page 3 of Appellee's Motion to Dismiss in this Court.) On the same page, appellee says:" . . . under local practice this was a fatal variance. . ."

On appeal from the verdict of guilty, the State Supreme Court held the amendment to be a "fatal variance." State v Cooke et al., 246 NC 518, 98 SE 2d 885, reproduced on Page 55 of appellants' Statement as to Jurisdiction. The State Supreme Court cited cases to indicate that this "fatal variance" rule was well and long established in the State. (See Page 58 of Jurisdictional Statement.)

Appellants believe that any competent, careful, and effective prosecutor, concerned about justice as well as prosecuting, and mindful of the expense, ordeal and embarrassment of multiple criminal prosecutions for the same offense, would have known this "fatal variance" rule, and hence would have started over again without amending the warrants and forcing appellants to trial and appeal, only to have to defend again and again against subsequent criminal prosecutions for the same alleged offense.

Appellants respectfully suggest that, for the prosecutor under these circumstances to request and to receive permission for such a "fatal-variance" amendment, and to force appellants to defend against such an amendment and to appeal the guilty verdict under the same in order to protect their "constitutional rights" show either the kind of incompetency or the kind of casualness or the kind of ineffectiveness,

and hence the kind of fundamental unfairness, which the Due Process Clause forbids in state prosecutors in criminal proceedings.

(b) Without finally disposing of the warrants as originally drawn in the first proceeding (only the amendment was held invalid by the State Supreme Court and so far as the record is concerned the original warrants in the first proceeding are still outstanding charging a criminal trespass upon Gillespie Park Golf Course), the State caused indictments in the Superior Court to be found against appellants, as the second original proceeding charging the identical acts as a trespass upon the property of "Gillespie Park Golf Club, Inc." (R 36-43)

A State statute then in force (GS 7-64) had deprived the Superior Court of jurisdiction under these indictments because, as the State Supreme Court said, the offense charged was only a misdemeanor (R 109-110), but the State required appellants to defend against these indictments in court and when they were called for trial, the State's prosecutor took "a Nol Pros with leave" in said indictments (R 43), thus leaving them on the record as pending against appellants. **State v Smith, 129 NC 546, State v Williams, 151 NC 660.**

Appellants believe that a competent, careful and effective prosecutor, concerned with justice as well as with prosecution, would have been familiar with this statute of his State (GS 7-64) and would not have caused these indictments to be found against appellants and would not have required appellants to defend against these indictments in the teeth of this statute.

Appellants respectfully suggest that to cause these indictments to be found and to require appellants to defend against them under these circumstances show the kind of incompetency or the kind of casualness or the kind of ineffectiveness, and hence the kind of fundamental unfairness, which the Due Process Clause forbids in State prosecutors in criminal proceedings.

(c) The warrants in the instant case constitute the third original criminal proceeding which the State has brought

against appellants for the identical acts charged to be the crime of trespass in this case. Appellants verily believe that the only reason why there have been three successive criminal proceedings instead of one, was **"merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time"** (**See Brock v North Carolina, supra.**), and in this case a third time.[4]

In its opinion in 246 NC 518, the Supreme Court of North Carolina said: "If the rightful possession is in one other than the person named in the warrant or bill, there is a fatal variance." In accordance with this rule, the North Carolina Supreme Court held on its own motion that there was such a "fatal variance" between the name **"Gillespie Park Golf Course"** in the warrants and the name **"Gillespie Park Golf Club, Inc."** as the one claimed in the amended warrants and proof to have "the rightful possession."

In the teeth of this holding the prosecutor in four of the warrants here involved alleged that the premises belonged to **"Gillespie Park Club, Inc."**, while in two of the warrants he alleged that the premises belonged to **"Gillespie Park Golf Club, Inc."**

Appellants believe that this obviously indicates the pros-

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[4]The lack of care and competence with which the prosecutor approached this case is further shown by the fact that the warrants here involved against Phillip Cooke (R 2,) Leon Wolfe (R 7), George Simpkins, Jr. (name also misspelled, R 10), and Joseph Sturdivent (R 14), say that the alleged trespass was upon "the premises of **Gillespie Park Club, Inc.,**" (Emphasis added.), and only the warrants against Samuel Murray (R 18) and Elijah H. Herring (R 22) say that the alleged trespass was upon "the premises of **Gillespie Park Golf Club, Inc.,**" (Emphasis added.)

There was thus just as much of a variance between the name of the alleged possessor of the golf course in four of the warrants which are involved upon this appeal, as in the first set of warrants discussed by the Supreme Court of North Carolina in its first opinion in 246 NC 518, where the warrants charged a trespass upon the property of **"Gillespie Park Golf Course,"** while the amended warrants and proof showed an alleged trespass upon the property of **"Gillespie Park Golf Club, Inc."**

ecutor's indifference to the number of criminal proceedings he might require appellants to defend against for the same alleged trespass upon Gillespie Park Golf Course, and also indicates the prosecutor's confidence that, if the Supreme Court of North Carolina had again **of its own motion** noticed the "fatal variance", prosecutor would again be allowed "to see if he cannot do better" (See Brock v North Carolina, supra) in a fourth criminal proceeding against appellants for the same alleged trespass in this case.

But, either by oversight, or change of rule between the two opinions (See North Carolina Supreme Court's opinion in this case, where in the statement of facts it is said that the warrants charged a trespass "upon the premises of Gillespie Park Club, Inc.," (R 108) the Supreme Court of North Carolina did not **of its own motion** notice the "fatal variance" between the name **"Gillespie Park Club, Inc.,** in the warrants and the name **"Gillespie Park Golf Club, Inc."** as the one claimed in the proof to have "the rightful possession."

Appellants believe that this oversight or change of rule between opinions by the Supreme Court of North Carolina discloses fundamental unfairness and lack of due process and equal protection, and gives judicial approval to a prosecutor who has been "incompetent or casual or even ineffective" (See Brock v North Carolina, supra) in prosecuting successive criminal proceedings against appellants for the same alleged offense.

This Court is familiar, of course, with the expense and ordeal and embarrassment of such multiple, successive criminal prosecutions for the same alleged offense, and appellants respectfully submit that the three successive original criminal proceedings disclosed in this case for the same acts of playing golf on this public golf course amount to the kind of undue harassment and fundamental unfairness which the Due Process Clause forbids.



ARGUMENT III

THE QUESTION OF JUDICIAL NOTICE

Insofar as the Question of Judicial Notice should become important in this case, appellants believe that it may cut across both the question of Jurisdiction and the Case on the Merits. Therefore, this question is given separate treatment. The Question is:

What documents or facts which may become germane to a decision of this case come within the principles under which this Court will take judicial notice of such documents and facts?

(1) Documents Representing Federal Court Proceedings

It seems clear that this Court will take judicial notice of documents representing Federal Court proceedings. In **Brown v Board of Education, 344 US 1, 3, 97 L ed 3, 4, 73 S Ct 1,** this Court said:

> **"This Court takes judicial notice of a fourth case,** which is pending in the United States Court of Appeals for the District of Columbia Circuit, Bolling et al. v. Sharpe et al., No. 11,018 on that court's docket. In that case, the appellants challenge the appellees' refusal to admit certain Negro appellants to a segregated white school in the District of Columbia; **they allege** that appellees have taken such action pursuant to certain Acts of Congress; **they allege** that such action is a violation of the Fifth Amendment of the Constitution." (Emphasis added.)

It will thus be noted that this Court took judicial notice even of **the pleadings** in the **Bolling Case.**

In **Wells v United States, 318 US 257, 260, 87 L ed 746, 748, 63 S Ct 582,** this Court said:

> "Nor can we say that there is want of support for the district court's recital in its order that 'the matters and things' contained in the application to set aside the conviction 'have heretofore been adjudicated.' For the Government's brief points out that petitioner, before his application to the district court in this proceeding, had

unsuccessfully sought release from custody in two habeas corpus proceedings, **of which the Federal Courts may take judicial notice,** both brought in the Northern District of California. In the second, there was a hearing in which he testified in his own behalf; other evidence was taken both oral and documentary, and the court made findings of fact contrary to the allegations of fact on which petitioner now relies. We cannot say that the district court in this case was unfamiliar with those proceedings, **merely because they do not appear in the record before us."** (Emphasis added.)

In **United States v John J. Felin & Co., 334 US 624, 640, 92 L ed 1614, 1626, 68 S Ct 1238,** this Court said:

"The prior proceedings between the same parties as to which we would be blind not to take judicial notice, as well as the unquestioned facts pertaining to the meat industry are relevant to interpret the findings of the Court of Claims."

(2) Documents Which Represent Federal Law

The Supremacy Clause of the Federal Constitution says that "the Judges in every State **shall be bound"** by "the supreme Law of the Land" (Emphasis added.) "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Thus it has been held that the duty "rests upon 'the State courts, equally with the courts of the Union, . . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . .' " **Irvin v Dowd, supra.**

It seems to be well settled that courts will take judicial notice of all matters of Federal law. In **Pocahontas Terminal Corporation v Portland Building and Construction Trades Council, 93 Fed Supp 217, 219, it is said:**

"While the complaint itself makes no mention of this statute and only incidental reference to the National Labor Relations Board, this Court takes judicial notice of any Federal laws necessarily brought into play by the allegations of the complaint; and it is immaterial that specific reference to such laws may be omitted in the

pleading. Southern Pacific Company v Steward, 1917, 245 US 359, 362, 38 S Ct 130, 62 L ed 345 . . ."

In the **Southern Pacific Company Case,** cited in the **Pocahontas Case,** it is said:

> **"While there is no specific allegation in the complaint that such bill of lading or receipt was issued, as the law makes it the duty of the carrier to issue the same the presumption is that such duty was complied with." (245 US at 362)**

It thus appears that judicial notice will be taken of all matters of Federal law. The Supreme Court of North Carolina has held that "in construing a Federal statute, a state court is bound by the construction placed on it by the Federal courts." **Mangum v Atlantic Coast Line Railway, 188 NC 689.**

This raises the question as to what is included in "the supreme Law of the Land" as envisaged by the Supremacy Clause of the Federal Constitution.

In **Garner v Teamsters, supra,** this Court said: "We conclude that **when federal power constitutionally is exerted** for the protection of public or private interests, or both, **it becomes the supreme law of the land."** (Emphasis added.)

Certainly a Federal Court's Declaratory Judgment and its Findings of Fact and Conclusions of Law, as well as its Opinion, which are clearly authorized by the Federal Declaratory Judgment Act, 28 USC 2201, represent actions "when federal power constitutionally is exerted," and as such become a part of Federal law and "the supreme law of the Land." In this case the North Carolina Supreme Court held that it was required to take judicial notice only of the "published opinion" of the United States District Court for the Middle District of North Carolina. "Our knowledge of the facts in that case," the State Supreme Court said, "is limited to what appears in the published opinion." (R 115) **Appellants believe that there is no valid basis for drawing a distinction between the exertion of Federal power in the Federal Court's opinion and its exertion in the Declaratory Judgment and its supporting Findings.**

(a) Judicial Notice in Applications of Federal Law

In **Bowles v United States, 319 US 33, 35, 87 L ed 1194, 1196, 63 S Ct 912,** this Court said the following in connection with its use of judicial notice in application of Federal law:

"On the argument before us the Government, which in the district court had denied petitioner access to his Selective Service file, produced from the file, and tendered for our consideration (1) a copy of petitioner's appeal to the President from the action taken by the appeal board, (2) a copy of the decision on that appeal rendered by the Director of Selective Service, by authority of the President and pursuant to Section 628.1 of the Selective Service Regulations, and (3) a copy of the letter of the draft board notifying petitioner that upon his appeal to the President his classification had been affirmed and that he would therefore be ordered to report for induction.

"The decision of the Director, **of which we take judicial notice . . .**" was held to be a "controlling determination of fact . . ." (Emphasis added.)

In **Lilly v Grand Trunk Western Railroad Company, 317 US 481, 488, 87 L ed 411, 416, 63 S Ct 347;** this Court said:

"Respondent insists that reliance cannot be placed on Rule 153 because it was not called to the attention of the trial court or the jury and its injection now would involve deciding the case on issues not submitted to the jury. We do not regard this point as well taken. No claim is advanced that the rule is invalid, and we see no reason for questioning it. **Adopted in the exercise of the Commission's authority, Rule 153 acquires the force of law and becomes an integral part of the Act . . ., to be judicially noticed."** (Emphasis added.)

(3) Judicial Notice of Public Documents

In **Zahn v Transamerica Corporation, 162 Fed 2d 36, 48,** the Court says: **"We may take judicial notice of the pleadings in the Neff case since they are public documents."** The **Neff Case** was a State Supreme Court case, 232 Ky 66.

(4) Judicial Notice of Matters of Common Knowledge

In **Schulte v Gangi, 328 US 108, 120, 90 L ed 1114, 1122, 68 S Ct 925,** this Court said: "**We will take judicial notice, as a matter of common knowledge,** that New York City produces more garments for interstate shipment than any other city in the Nation." (Emphasis added.)

In **Parker v Brown, 317 US 341, 363, 87 L ed 315, 333, 63 S Ct 307,** this Court took judicial notice of "available data of the raisin industry in California."

(5) General Principles and Philosophy of Judicial Notice

In the book, "Evidence—Cases and Materials"—Morgan, Maguire and Weinstein (1957) Chap. 1, "Judicial Notice," Page 11, Mr. Justice Frankfurter is quoted as making the following observations in an exchange with counsel upon oral argument:

> **"I am merely going to the point that in these matters this Court takes judicial notice of accredited writings, and it does not have to call the writers as witnesses. How to inform the judicial mind, as you know, is one of the most complicated problems. It is better to have witnesses, but I did not know that we could not read the works of accredited writers."**

In Morgan, "Judicial Notice," (1944) 57 Harvard Law Review, 269, 286, the general view is taken that anything is subject to judicial notice which "is capable of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy."

In "Sense and Nonsense About Judicial Notice" (1950) Keefe, Landis and Shaad, 2 Stanford Law Review 664, the authors say:

> "We know that not every fact is proved during the course of a lawsuit—**manifesta probatione non indigent** (what is known need not be proved). This practice has its roots far back in the civil and canon law. It is part and parcel of legal or judicial reasoning, no step of which

can be taken without assuming something that has not been proved. The capacity to perform this process with competent judgment and efficiency is imputed to judges and jurors as part of their necessary mental outfit."

(6) Judicial Notice in the State Courts

The North Carolina State Supreme Court took judicial notice of **"the published opinion"** of the Federal Court in the **Simkins Case, 149, Fed Supp 562,** saying: "Our knowledge of **the facts in that case** is limited to what appears in the published opinion." (R 115—Emphasis added.)

Appellants filed a formal motion requesting the Supreme Court of North Carolina to take judicial notice of records in the **Simkins Case,** certified copies of which were tendered for the convenience of that Court. (R 128—See **Bowles v United States, supra.)**

In the Motion to Quash filed in the Superior Court appellants requested that court "to receive and consider the record and judgment roll in the Federal case." (R 33) This request was repeated by reference in the Motion to Set Aside the Verdict. (R 92) Appellants believe that this was an adequate bringing of the Federal Court records to the attention of the trial court for purposes of judicial notice. Appellants also specifically requested the trial court "to take judicial notice of this matter of common knowledge" about racial discrimination at the golf course. (R 93) Of course, the Federal Court records were formally offered in evidence but refused admission by the trial court. (See Appendixes 4(a) and 4(b), Pages 97, 98.)

CONCLUSION

Wherefore, appellants pray that this Court enter an order as follows:

1. Taking jurisdiction of this appeal under 28 USC 1257 (2) or, in the alternative, treating the appeal papers as a Petition for Certiorari under 28 USC 2103 and granting such Petition.

2. Declaring that Section 14-134 of the General Statutes

of North Carolina, as construed and applied in this case, collides unconstitutionally with Paragraph 2 of Article VI (the Supremacy Clause) of the Constitution of the United States:

(a) In that said statute has been used here by the State to implement the State's policy of making a "private club" out of Gillespie Park Golf Course, contrary to the policy of applicable Federal law that said golf course should be a public golf course offering "the greatest degree of public usefulness."

(b) In that said statute has been further used here by the State to implement a State policy directly contrary to the agreement made by the State's agencies with the United States Government that this golf course would be a public golf course during its useful life and would not during such useful life "be leased, sold, donated, or otherwise disposed of to a private individual or corporation, or quasi-public corporation."

(c) In that said statute has been used here by the State to frustrate and render ineffectual the Declaratory Judgment of the United States District Court for the Middle District of North Carolina in Simkins et al. v City of Greensboro et al., 149 Fed Supp 562.

3. Declaring that Section 14-134 of the General Statutes of North Carolina, as construed and applied in this case violates the Due Process and/or the Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States as follows:

(a) In that in the trial of this case the State closed the mouths to the truth of key witnesses, so that evidence material to appellants' defense was suppressed by the State's rules of evidence.

(b) In that the State in this case has unduly and unconstitutionally harassed appellants by multiple criminal proceedings allowed by the State only to permit a prosecutor who has been either "incompetent or casual or even ineffective" to see if he could not do better a second or a third time.

(c) In that appellants were denied the use of Gillespie Park Golf Course by the State's agencies because of the race

or color of appellants, and further in that appellants were arbitrarily denied use of Gillespie Park Golf Course because of the absence of standards to govern the State's agencies in the exercise of the authority granted them to determine who could and who could not play on said golf course.

4. Protecting and effectuating the above mentioned Declaratory Judgment of the United States District Court for the Middle District of North Carolina by such process as to this Court may seem just or proper.

5. Directing the Supreme Court of North Carolina to take appropriate steps to require the State's agencies to abide by their agreement with the United States Government covering said Gillespie Park Golf Course.

6. Ordering appropriate proceedings in the State courts to set aside the convictions and jail sentences now outstanding against appellants in this case, and to release appellants entirely therefrom and to release the sureties on the bonds of appellants.

7. Reversing the judgment of the Supreme Court of North Carolina in this case.

8. Giving to appellants such other and further relief as to this Court may seem just and proper under the facts and circumstances of this case.

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Other Counsel for Appellants:

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Annie Brown Kennedy
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Carter W. Wesley
James M. Nabrit, Jr.
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FACTS

In 1940, City of Greensboro and The Greensboro City Board of Education joined in an application to the Works Progress Administration of the United States government for funds with which to construct a nine-hole golf course on property owned by the school board. The application was approved, and the City and the W.P.A. constructed the course. The property was then leased to the City by the school board. Until 1949, the City operated the golf course exclusively for white citizens.

In 1949, at the request of the City, the City and the school board, in two separate leases, leased to Gillespie Park Golf Club, Incorporated, a private corporation, the original nine-hole course which was on school board property, and enough adjacent land owned by the City for an additional nine holes. In 1950, the City constructed an additional nine holes on its land, which it had reserved the right to do under the lease.

Also in 1950, the City constructed a nine-hole golf course for Negroes at Nocho Park and leased it to Nocho Park Golf Club, Incorporated, a private corporation.

Statements by the City Accountant show the net expenditures (total expenditures minus total income) on both courses to be the same—approximately fifteen thousand dollars for each. (Appendix, p. A26-A28.)

From the date when these golf courses were leased to private corporations, the lessees have had full control and management of the golf courses. No lease provides for any racial segregation of these facilities.

In November and December of 1955, Negroes sought to use the facilities of the Gillespie Park Golf Course, and were denied such use by employees of the Gillespie Park Golf Club, Incorporated.

if it operates them, and it has never asserted the right of its lessee to do so. All it asks is a dismissal of the action as to it.

POINT 2. THE DISTRICT COURT ERRED IN FINDING AS A FACT AND CONCLUDING, AS A MATTER OF LAW, THAT AN AGREEMENT EXISTED AMONG APPELLANT CITY OF GREENSBORO, THE GREENSBORO CITY BOARD OF EDUCATION, AND THE UNITED STATES GOVERNMENT, THAT APPELLANT CITY OF GREENSBORO WOULD "MAINTAIN AND OPERATE SAID GOLF COURSE FOR THE USE AND BENEFIT OF THE PUBLIC DURING THE USEFUL LIFE OF SAID GOLF COURSE."

POINT 3. THE DISTRICT COURT ERRED IN FINDING AS A FACT THAT AN AGREEMENT EXISTED AMONG APPELLANT CITY OF GREENSBORO, THE GREENSBORO CITY BOARD OF EDUCATION, AND THE UNITED STATES GOVERNMENT, THAT THE GOLF COURSE PROPERTY WOULD NOT BE "LEASED, SOLD, DONATED OR OTHERWISE DISPOSED OF TO A PRIVATE INDIVIDUAL OR CORPORATION, OR QUASI-PUBLIC CORPORATION, DURING THE USEFUL LIFE OF SAID GOLF COURSE."

(The arguments on Points 2 and 3 would be repetitious if stated separately, so they are combined for brevity.)

The issues involved in these points are raised by Finding of Fact No. 20 and Conclusion of Law No. 3 (Appendix, pp. A10-A11 and A15, respectively), which are apparently based upon provisions found in appellees' (plaintiffs') Exhibit No. 19. (Appendix, pp. A24, A25.) In their appli-

cation for federal funds with which to build the original nine-hole golf course on school property, the applicants were asked:

> "18. Is it *contemplated* that public property to be improved by this project will be leased, sold, donated or otherwise disposed of to a private individual or corporation, or a quasi-public organization, during the useful life of such improvement? no If (Yes or no)
> 'Yes,' a complete explanation must accompany the application." (Emphasis supplied.) (Appendix p. A24.)

On the reverse side of the page are the following instructions for answering question No. 18:

> "Item 18. Property to be improved by a WPA project must be used for the conduct of normal Governmental functions and for the benefit of the public. Before any proposal may be accepted by this Administration, it must be established that the sponsor *intends* to use the property for public purposes during the useful life of the improvements to be made under the project. If the question in item 18 is answered 'Yes,' complete explanation and documentation must accompany the application in order that the public benefit may be established." (Appendix, p. A24.) (Emphasis supplied.)

Appellees contended, and the District Court found, that this language constitutes an agreement which binds the City and the school board to operate and maintain the golf course during its useful life, and not to lease it to a private corporation during this period. But the District Court upheld the validity of the leases, and, in its decree and injunction, specifically excepts from the prohibition against disposal of the property a "*bona fide* sale." (Appendix, p. A22.) Consequently, Finding of Fact No. 20 and Conclusion of Law No. 3 are in conflict with Paragraph No. 1 of the decree.

APPENDIX 2 (a)

GREENSBORO DAILY NEWS

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age 4, Sec. D SUNDAY, JUNE 30, 1957

Give And Take On Golf Courses

Out of Raleigh and Richmond Friday fternoon came the double-whammy of wo judicial decisions—one state and one ederal—demolishing with obvious final- y resistance of the City of Greensboro o opening of Gillespie Park Golf Course o Negroes.

In the State Supreme Court case, a uperior Court finding of guilt against x Greensboro Negroes for "trespassing" n golf course premises was knocked own, largely on grounds of technicality n amended warrant), but knocked own all the same.

In the U.S. Fourth Circuit Court of ppeals case, the decision of Judge John- on J. Hayes denying discrimination by ace was tersely upheld, and the only ecourse open to the city was an appeal o a court even more firmly staked out n the issue.

Appeal of the case, we think, was foolish from the beginning. Experience in High Point, Charlotte and Asheville shows that dropping of racial restrictions makes scarcely no difference in golf course operation. There is some racial break-through, yes, but it bothers few if any white patrons; and the initial break-through—that is, elimination of the stigma—does not ordinarily bring on a deluge.

It would seem far better in the case of golf courses, libraries, busses and similar fields for the white South to find some means of adjustment to change; just as it would seem judicious indeed for Negro citizens to refrain from pushing their luck in swimming pool experiments and wholesale public school integration.

The South will adjust to some change—even where it has exhausted all its legal resources—unless it is pushed too hard.

APPENDIX 2 (b)

SECTION B— 8 PAGES

TUESDAY, AUGUST 6, 1957

City Gives Notice It Intends To End Golf Club Lease

The Greensboro City Council yesterday gave a 10-day notice to the Gillespie Park Golf Club Inc. that the city intends to cancel the club's lease and take over assets of the club.

The club was named a defendant, with the city, in a suit brought in Federal Court by Negroes claiming they had been denied admission to the city-owned course. The city and club lost the case. The city's lease to the club was declared valid by the court, but the court, ruling the club was an agency of the city, stated that Negroes could not be denied use of the course.

Notice of cancellation of the club's lease brought "no comment" from the president of the club, John R. Hughes.

City councilmen stated in their resolution that the club had abandoned the golf course and had failed to keep the club house and golf course in a good state of repair.

To Take Over Assets

They also notified the club that the council intended to take over all assets of the club, which was listed as a nonprofit, nonstock corporation.

On recommendation of City Manager James R. Townsend, the council accepted a cash settlement of $7,354 for fire damages to the club house. The cash was taken in preference to repairing the structure.

In other action, the council postponed for two weeks the adoption of a resolution ordering paving on Florida Street from High Point Road to Hardie Street. Three owners of tracts in the right of way told the council they could not afford assessments for the improvement.

APPENDIX 2 (c)

oro Record

Tuesday, August 13, 1957

City Council espie Course

learing Is Set or Committee lere Thursday

BY HAWK JOHNSON
Record Staff Writer

A petition urging the ity to reopen Gillespie ark Golf Course has been repared for presentation t Greensboro City Coun- il committee sessions hursday.

The petition containing names f 328 white and Negro persons ks the Gillespie Park Golf Club d the Council of the City of reensboro "to reopen Gillespie ark as a municipal golf course r the recreation of residents of e City of Greensboro."

The petition has been placed n the agenda for discussion y the city council's real estate committee when the four coun- il committees go in session t 2 p.m. Thursday in council hambers.

The request is the latest step in a series of events concerning the South Greensboro recreational facility which began last October when 10 Greensboro Negroes filed suit against the golf club, city and Greensboro Board of Education. The 10 sought racially integrated use of the 18 hole course which was operated by a private club leasing land from the city and school board. A federal court order gave the 10—and other Negroes "similarly situated"—permission to use the course along with white residents, a decision upheld by the U.S. Fourth Court of Appeals.

The integration order signed by Federal Judge Johnson J. Hayes followed by one day the announced decision of John R. Hughes, Gillespie Park Golf Club Inc., president, that operations at the course were suspended due to a fire which destroyed part of the clubhouse.

Only last week, city council gave notice to Gillespie Park Golf Club that the city will cancel its lease—which would have expired next April — on Aug. 15 (day of the committee session). City councilmen, in a resolution approved for cancellation of the lease noted that the club had breached the lease by failing to keep the clubhouse and golf course in a state of good repair. They notified the club that council intends to take over all assets of the club—a nonstock, nonprofit corporation.

The council also accepted a cash settlement of $7,354 for damages to the clubhouse because of fire.

Control of the course is still in doubt, however. The Greensboro Board of Education owns half of the course property containing half of the 18-hole layout. The board has given no indication of plans to cancel its lease with the golf club. Nor has the city announced what plans, if any, it has for the property, including the clubhouse, it holds title to.

The property has been zoned for industrial purposes and could be sold. Any sale, however, must be approved by the federal court which noted in its integration order that "a bona fide" sale of the property must be given court approval.

The petition bears signatures of several of the plaintiffs in the federal court action, names of a few ministers, both white and Negro residents of Greensboro and several with out-of-town addresses.

It will be presented to the council real estate committee composed of William Folk Jr., chairman; Tom E. Brown, vice chairman; J. M. Denny and Albert F. Stevens Jr.

The public works committee, headed by William B. Burke, will consider recommendations for water and sewer installations on Buff and Barringer Streets, report of curb and gutter deficiencies, widening of 16th Street and curb and gutter installation, preliminary resolutions calling for public hearings on laying water and sewer lines along several other city streets.

The transportation committee will be asked to deny taxicab operator's permit to Lewis E. Turner.

APPENDIX 2 (d)

B10—The Greensboro Record, Friday, August 16, 1957

Council To Decide Monday On Future Of Golf Course

The question of what to do with a city owned golf course will be before Greensboro City Council again Monday following hearing of a request yesterday to open Gillespie Golf Course.

City councilmen, sitting in committee sessions, voted to send the request to council at 2:15 p.m. Monday without recommendation.

A delegation of former Gillespie Park golfers, led by J. B. Danely of 2514 Walker Ave., appeared before the real estate committee to ask that the golf facilities be reopened. The course was closed to play June 27 by the Gillespie Park Golf Club Inc., a day before a federal court order was handed down prohibiting segregating golfers by races. The club, a non-stock, non-profit corporation, operated the course under a lease agreement with the city and the school board, property owners.

Ernest Edwards, golfing professional at the course, declared a "dire need" for the facility exists, explaining that 22,000 rounds were played there last year.

J. Kenneth Lee, Negro attorney, pleaded for improved maintenance at Nocho Park Golf Course for Negroes and insisted that there is a need for both golfing facilities.

An earlier motion by Councilman Tom Brown to send the request to the Parks and Recreation Commission for study was defeated 4-3 before committeemen decided to refer the petitions to a full council meeting without recommendation.

Other matters heard during committee sessions included a request by Mayor George H. Roach to the Guilford Health Department for 500 doses of Asiatic flu vaccine to protect city workers.

A request for $10,000 to erect a footbridge over North Buffalo Creek to provide access to Kiser Junior High School was sent to Monday's council meeting without recommendation as was a request by the Guilford Humane Society for an addition of $1,500 to the 1957-58 appropriation toward a county-Greensboro animal shelter.

Committeemen approved hearings on public necessity installation of curb and gutter on 16[illegible] Street, water and sewer on Buff Street and paving on Barringer Street.

APPENDIX 2 (e)

B12—The Greensboro Record, Tuesday, August 20, 1957

Permanent Closing Is Decreed For Gillespie Park Golf Course

Gillespie Park Golf Course, already overgrown with grass and weeds, has been sealed off from play by the Greensboro City Council, which yesterday ordered permanent closing of the recreational facility.

By unanimous vote of council, a resolution was passed ending play on the once popular recreational facility—one that has seen more than 175,000 rounds of golf played since the course was enlarged to 18 holes in 1950.

In voting to close the course at which a federal court order would allow integrated golfing, the council resolution pointed out that only a portion of the land is owned by the city and that portion is "inadequate for an 18-hole course." "Funds are not on hand" for operating the facility, the resolution stated, with the city having lost revenue this year from intangible taxes, and the city could not afford to spend money on golf course improvements without jeopardizing other recreational projects.

In 1940, the city and the city board of education, each owning approximately 75 acres of property off South Asheboro Street, applied for Works Progress Administration funds to build the course. The property was leased by the city by the school board and until 1949 the city operated the course for white citizens. Then, the city and board in two separate leases granted control to Gillespie Park Golf Club Inc., a private corporation. In 1950, the city constructed an additional nine holes on its portion of the property. (Also in 1950, the city built a nine-hole golf course for Negroes at Nocho Park.)

Last October, 10 Greensboro Negroes filed suit in federal court against the golf club, the city and school board, asking permission to play Gillespie Park. That request was granted by the district court and upheld by a June 28 ruling of the U.S. Fourth Circuit Court of Appeals.

Golf club directors, however, on June 27 had announced decision to close the course following a fire which destroyed a portion of the clubhouse. The city council recently voted to terminate its lease with the golf club as of Aug. 15 because the club had ceased to operate the facility and had failed to maintain the course property. The school board has not acted to cancel its lease with the club.

Attendance and participation records compiled each year by The Greensboro Record showed 22,803 rounds of golf were played at Gillespie Park in 1956, less than 2,000 rounds under Green Valley Golf Course, a private golf course which led all Greensboro area golfing facilities in numbers of rounds played.

Nine year totals for Gillespie participation—as far back as records go, show 178,007 rounds had been played there by the first of this year. There are no records for play on the South Greensboro course for 1957.

The council resolution not that the golf course site able for "expande cilities," leading late that the p utilized for a l use. Others c erty may be purposes. An must be appro court which re in disposal of

City Golf Course Ordered Closed Permanently 8/20/

The Gillespie Park Golf Course, closed since a fire damaged the clubhouse in late June, was ordered permanently closed by the Greensboro City Council yesterday.

Action was by unanimous vote of the council. It brought to an end the speculation created by the presentation of a petition to the council last week requesting that the course be reopened. Councilmen took no action regarding the nine-hole Negro course known as Nocho Park although a Negro minister, Rev. J. T. Douglas, pastor of St. James Presbyterian Church, gave an impassioned speech asking that the Gillespie and Nocho courses be improved.

The council resolution closing Gillespie stated that only a portion of the course (nine holes belonging to the city school board) was under control of the city, and that portion was insufficient to provide an adequate course.

(The city was under court order to desegregate the Gillespie course just prior to the fire.)

Other Needs Cited

Also, the council found that the city had need for expanding service facilities. That was interpreted to indicate the possibility that the city might use the area for a land fill for waste use.

The resolution stated, too, that, with the city having lost revenue from intangible taxes (estimated at $100,000), it could not afford to spend money on golf course improvements without jeopardizing other recreation projects.

After the resolution was read, a resident of the Gillespie Park neighborhood, George A. Minnish, objected to Negro children "running through there," objected to the Gillespie and Nocho courses being operated by the city and urged the council to close both courses.

Councilmen Reminded

Describing golf as a "vital part of our community life," Rev. Mr. Douglas reminded councilmen that recreational facilities and schools are two elements "seriously considered by new industries which might be interested in locating here."

He said the council's proposal to close the Gillespie course was a "step backward" at a time when "we shoud be working together to make progress" in interracial relations. The council, he added, might improve relations by improving neighborhood recreation areas.

Before concluding his talk on harmony and Christian conduct, the minister asked God's blessing on the council in the decision they were to make.

The preacher's remarks were followed by a short statement from Eugene Hood, recognized anti-integrationist.

Wants Course Closed

"I'm in favor of closing the golf course," said Hood. "There are a hundred acres out there you've been providing for a handful of golfers. . . . Golf is an expensive game. . . . And you shouldn't spend taxpayers' money for such a small group."

The council vote, all nine members voting to close the course, followed.

No voice, other than the minister's, was raised against the closing. Last Thursday, however, Ernest Edwards, golf professional, presented a petition signed by more than 300 persons asking that the course be reopened. Kenneth Lee, Negro attorney, also asked that the course be reopened and that Nocho Park course be improved.

The Mayor announced the appointment of the following committee memberships:

City-County Committee
D. Newton Farnell, Chairman
J. M. Denny
Tom E. Brown

Water Committee
William B. Burke, Chairman
E. E. Zane
Kibert F. Lewis

I, Hazel N. Burch, City Clerk of the City of Greensboro, hereby certify this to be a true and exact copy of Page #190 of Minute Book #31 of the City Council of the City of Greensboro.
Witness my hand and the corporate seal of the City of Greensboro, this the 6th day of February, 1959.

Hazel N. Burch
City Clerk

Councilman Burke introduced the following resolution and moved its adoption. The motion was seconded by Councilman Denny, and the resolution was adopted on the following roll call vote: Ayes: Brown, Burke, Denny, Farnell, Folk, Lewis, Roach, Stevens, and Zane. Noes: None.

RESOLUTION TERMINATING THE LEASE OF THE GILLESPIE PARK GOLF COURSE PROPERTY TO GILLESPIE PARK GOLF CLUB, INC., AND DIRECTING THE SUPERVISOR OF PUBLIC PROPERTY TO TAKE POSSESSION OF THE GOLD COURSE AND ALL PROPERTY AND EQUIPMENT OF THE CITY LOCATED THEREON AND ELSEWHERE 2515

WHEREAS, Paragraph 9 of the lease of the Gillespie Park Golf Course to Gillespie Park Golf Club, Inc., which is dated 7 April 1949 and has been renewed until 7 April 1958, recites that it is entered into for the purpose of permitting the Gold Club to operate a golf course on the Golf Course property, and the Golf Club has now abandoned the operation of the golf course;

WHEREAS, Paragraph 5 of the lease requires the Golf Club to keep the club house and equipment and facilities located therein and the personal property used in the operation of the club house and golf course in good state of repair, which the Golf Club has failed to do;

WHEREAS, Paragraph 12 of the lase provides that the City reserves the right to cancel the same upon ten days written notice to the Club, upon the failure of the Club to carry out any provision of the lease; and

WHEREAS, The Gillespie Park Golf Club, Inc., was created a non-profit, non-stock corporation and no person, other than the City, has invested any funds in the corporation or in the Golf Course and its equipment, and the Golf Club has operated solely on funds derived from the use of the Golf Course;

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF GREENSBORO:

1. That the City Attorney is directed to notify Gillespie Park Golf Club, Inc., of the cancellation of the above lease;

2. That the Supervisor of Public Property of the City is directed, ten days from the adoption of this resolution, to take possession of that portion of Gillespie Park Golf Course which is owned by the City; the club house; the equipment which was turned over to the Golf Club under the terms of the lease and which is listed in the lease by inventory; and all property acquired by and in the possession of the Golf Club including cash.

(Signed) William B. Burke

The City Manager advised the Council that the insurance company has offered to settle the fire damage to the Gillespie Park Clubhouse for the full amount of the damage, i.e., $7,384.00, and recommended acceptance of this amount. Councilman Zane introduced the following resolution and moved its adoption. The motion was seconded by Councilman Denny, and the resolution was adopted on the following roll call vote: Ayes: Brown, Burke, Denny, Farnell, Folk, Lewis, Roach, Stevens, and Zane. Noes: None.

RESOLUTION AUTHORIZING THE ACCEPTANCE OF PAYMENT FOR DAMAGES TO GILLESPIE PARK GOLF CLUBHOUSE 2516

WHEREAS, under the terms of a lease, dated 7 April 1949, and renewed from time to time, City of Greensboro is the beneficiary of a fire insurance policy covering the golf clubhouse at Gillespie Park golf course;

WHEREAS, the clubhouse has been damaged by fire to such an extent that it will cost $7,384.00 to repair it; and

WHEREAS, City of Greensboro has been offered the full amount of damages in settlement of the insurance liability;

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF GREENSBORO:

APPENDIX 3 (a)

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PREFACE

The Manual of Rules and Regulations of the Work Projects Administration is designed for issuance as a four-volume edition of all policy and regulatory procedures for the organization and operation of the Work Projects Administration. When completed, it will consist of the following volumes:

Volume 1 Organization and Administration
Volume 2 Project Planning and Operation
Volume 3 Employment
Volume 4 Finance

The Manual is issued in loose-leaf form so as to permit the insertion or removal of pages upon which additions or deletions of procedural statements are made necessary by changes in policy or fact. Revised or added pages will be issued as needed, and the volumes shall be kept up to date by all persons to whom issued and who are entrusted with the responsibility of operation of any phase of the program.

To permit ready reference, as well as to provide a simple method of numbering which will allow expansion or contraction when needed, a page numbering system is provided based upon a modified decimal plan. Each page number consists of three sets of numbers set off by decimal points. The first series represents the volume number; the second series, the chapter number within the volume; and the third, the page number within the chapter. As a result, page 1 of chapter 1 of volume 1 would be identified by the number 1.1.001. Pages are numbered in a decimal series of three digits, permitting a possible original issuance of 999 pages to a chapter. In this way, when it is found necessary to add a page between two numbered pages (i.e., 1.3.015 and 1.3.016), the new page will be numbered as a fourth digit of the decimal using the number of three decimal digits immediately preceding the new page (i.e., 1.3.0155).

Volumes are divided into numbered chapters, and chapters into numbered parts. Further subject divisions are identified by titles but not by numbers. In this way, complete new subjects below a part division may be added without disturbing the subject numbering.

Revised pages will be identified by the following statement in the lower inside of the page "Revised _____(date)_____." Additional pages will show "Added _____(date)_____." Revised or added pages will be transmitted by means of a series of four "Transmittal Letters," one series for each volume and numbered consecutively for each series. The transmittal letters will serve the following threefold purposes:

1. Transmit as an attachment the pages to be substituted or added and give instructions for insertion.
2. State the new policy or the change in policy involved and the reason for such new policy or change in policy.
3. Give such nonrecurring instructions as are necessary to effect the new or changed policy and the date such policy shall be made effective.

APPENDIX 3 (b)

The material contained in this Manual will have to remain flexible in order that changes may be made to meet changing conditions or problems. Complete volumes will be issued in limited number in order to facilitate maintenance of an accurate mailing list for the forwarding of revisions for the maintenance of the books. It is the responsibility of all WPA employees to maintain the material on a current basis and to insert or substitute all additional or revised pages received. Transmittal letters shall be detached and filed separately.

In accordance with the authority vested in the Commissioner of Work Projects by the Emergency Relief Appropriation Acts, the rules and regulations, as stated in the Manual of Rules and Regulations, are declared to be the rules of the Work Projects Administration until changed or modified by the order of the Commissioner or the Law.

F. C. Harrington

F. C. HARRINGTON
Commissioner of Work Projects

APPENDIX 3 (c)

Chapter I

CREATION AND ORGANIZATION DEVELOPMENT

PART I. CREATION, PURPOSE, AND GENERAL AUTHORITY

Emergency Relief Appropriation Act of 1935.

The Emergency Relief Appropriation Act of 1935, approved April 8, 1935, provided an appropriation for relief and work relief on useful projects. The President of the United States was authorized by this act to establish and prescribe the duties and functions of necessary agencies within the Government to carry out this purpose.

Creation of the Works Progress Administration.

The President, by Executive Order No. 7034, dated May 6, 1935, created the Works Progress Administration to administer a program to provide relief and work relief and to increase employment by providing for useful projects for which funds were appropriated in the Emergency Relief Appropriation Act of 1935.

Objective and Basic Functions

Defined Objective.

The original purpose of the Works Progress Administration as expressed in Executive Order No. 7034 was as follows: "A Works Progress Administration is established which shall be responsible to the President for the honest, efficient, speedy, and coordinated execution of the work relief program as a whole and for the execution of that program in such manner as to move from the relief rolls to work on such projects or in private employment the maximum number of persons in the shortest time possible."

Under the President's First Plan on Government Reorganization, submitted to Congress on April 25, 1939, the Works Progress Administration was incorporated in the Federal Works Agency, under the name of Work Projects Administration.

The Work Projects Administration is responsible for the planning and operation of useful work projects sponsored by local and Federal agencies and designed and scheduled so as to provide a maximum employment in all localities where relief from unemployment is needed.

1.1.001

APPENDIX 3 (d)

Legislative Development of the Work Program

Continuation of Works Progress Administration by EMA Acts.

The powers and functions of the Works Progress Administration, as defined by Executive Order No. 7034, were continued by Executive Orders No. 7336, dated June 22, 1936, and No. 7649, dated June 29, 1937, which made applicable to the program carried on under the Emergency Relief Appropriation Acts of 1936 and 1937, respectively, all Executive Orders, rules, and regulations issued under authority of the Emergency Relief Appropriation Act of 1935.

Authority Vested in the Federal Administrator by EMA Act of 1938.

By the Emergency Relief Appropriation Act of 1938, the Works Progress Administration and the National Youth Administration were extended until June 30, 1939. This act also vested the Federal Administrator of the Works Progress Administration with authority to prescribe rules and regulations necessary for carrying out the purposes of the act insofar as they relate to the Works Progress Administration, and to make allocations to other Federal agencies.

Creation of Work Projects Administration by Reorganization Plan No. 1.

Under authority vested in him by the Reorganization Act of 1939, approved April 3, 1939, the President evolved Reorganization Plan No. 1 providing for the consolidation of the Works Progress Administration and its functions (with the exception of the National Youth Administration) and certain other agencies into the Federal Works Agency. The plan further provided that the Works Progress Administration and its functions should henceforth be administered as the Work Projects Administration. Reorganization Plan No. 1 was approved by Congress in Public Resolution No. 20, 76th Congress, to become effective July 1, 1939.

Basic Provisions of EMA Act of 1939.

The Emergency Relief Appropriation Act of 1939, approved June 30, 1939, appropriated funds to the Work Projects Administration for the purpose of prosecuting public projects approved under the Emergency Relief Appropriation Acts of 1935, 1936, 1937, and 1938, and certain types of public projects, Federal and non-Federal, as approved by the President. The act also authorized the Work Projects Administration to carry on, until June 30, 1940, the functions formerly vested in the Works Progress Administration subject to the provisions of the act.

APPENDIX 3 (e)

Position in the Federal Works Agency

Administrator Head of Federal Works Agency.

In creating the Federal Works Agency, the President provided in Reorganization Plan No. 1 that a Federal Works Administrator should be placed at the head thereof and charged with responsibility for the general direction and supervision over the administration of the several agencies consolidated into the Federal Works Agency, and for the coordination of their functions.

—Five Agencies Consolidated.

The agencies consolidated into the Federal Works Agency are:

1. Public Roads Administration (formerly the Bureau of Public Roads in the Department of Agriculture).
2. Public Buildings Administration (formerly the Public Buildings Branch of the Procurement Division in the Treasury Department; the Branch of Buildings Management of the National Park Service in the Department of Interior; and the functions of the National Park Service in the District of Columbia in connection with the general assignment of space, the selection of sites for public buildings, and the determination of the priority in which the construction or enlargement of public buildings shall be undertaken).
3. United States Housing Authority (formerly in the Department of Interior).
4. Public Works Administration (formerly the Federal Emergency Administration of Public Works).
5. Work Projects Administration (formerly the Works Progress Administration).

Commissioner of Work Projects.

Reorganization Plan No. 1 also provides that the Work Projects Administration shall be administered by a Commissioner of Work Projects.

Personnel and Property Transferred to Federal Works Agency.

The plan further provided for the transfer of the personnel of the several agencies consolidated into the Federal Works Agency and for the transfer of all records and property (including equipment) of the several agencies to the jurisdiction and control of the Federal Works Agency.

APPENDIX 3 (f)

PART III. RELATIONSHIPS BETWEEN WORK PROJECTS ADMINISTRATION AND OTHER PUBLIC AGENCIES

Public Agencies Concerned With WPA Program.

The character of the WPA program necessitates that its operation be carried out in close cooperation with other public agencies. The other public agencies concerned in the operation of the WPA program are classified as follows: (1) public agencies for which projects are operated and which sponsor such projects; (2) public welfare agencies which refer needy persons to the Work Projects Administration for certification for employment on WPA projects; and (3) Federal agencies which perform administrative and supervisory services for the Work Projects Administration. Liaison with such public agencies is maintained by WPA divisions as outlined in this part.

Relations With Project Sponsors

Necessity for Project Sponsors

Each WPA project is required to have a public agency as sponsor. The Emergency Relief Appropriation Act of 1939 specifically provides that the funds appropriated therein shall not be available for the operation of any project sponsored solely by the Work Projects Administration.

Eligible Project Sponsors.

Eligible sponsors for WPA projects are Federal departments; States, political subdivisions thereof, or legally constituted public agencies of a State or political subdivision; and those types of agencies and bodies specifically authorized to be eligible sponsors by the current Emergency Relief Appropriation Act. In special cases, nonprofit, quasi-public agencies which are legally controlled by public authority through power of appointment or otherwise, which receive their principal support by regular budgetary appropriations from public revenue, and the assets of which upon dissolution revert to public ownership, may sponsor WPA projects which are of direct and immediate benefit to the general public. Other eligible public agencies may act as co-sponsors with the official sponsor; nonpublic bodies and individuals who assist sponsors in planning or carrying out other WPA projects are designated as other contributors or cooperating sponsors.

Advising Project Sponsors.

The operating divisions of the Work Projects Administration are primarily responsible for consulting with and advising prospective sponsors as to the development of projects.

Liaison With Sponsors.

The operation of approved projects is a joint responsibility of the sponsors and the Work Projects Administration. Liaison with sponsors in the operation of projects is maintained by the WPA operating divisions.

Sponsors' Contributions.

The Emergency Relief Appropriation Act of 1939 also provides that "not to exceed three-fourths of the total cost of all non-Federal projects • • • undertaken within any State, Territory, possession, or the District of Columbia • • • shall be borne by the United States, and not less than one-fourth of such total cost shall be borne by the State and its political subdivisions, or by the Territory, possession, or the District of Columbia, as the case may be." Sponsors' contributions to the cost of projects may be in the form of cash, materials, and supplies, and to the extent that a financial burden is involved, such other items as equipment rentals, implements, space rentals, personal services at the project site, transportation and handling charges, publication and duplication costs, professional consulting services, certain types of installed equipment, land purchases, leases, easements, rights-of-way, and costs of production activities. Regulations governing amounts and types of sponsors' contributions are stated elsewhere in this Manual.

Chapter 5

GENERAL CONDITIONS OF PROJECT OPERATIONS

PART 1. AUTHORITY AND RESPONSIBILITY FOR PROJECT OPERATION

There will be found in this chapter those regulations and procedures which constitute the general conditions applying to the operation of all types of projects, particularly as such regulations and procedures involve principles or policies which are the special concern of persons charged with the responsibility of directing project operations. Special conditions pertaining to the operation of certain classes of projects and types of work are covered in succeeding chapters.

WPA Authority and Responsibility for Project Operation

WPA authority and responsibility for project operation.

—Sponsorship.

The Work Projects Administration is charged with the responsibility of providing work for needy persons on useful public projects. It carries out this responsibility by operating, or cooperating in the execution of, projects sponsored by public bodies which are designed to provide additional facilities, activities, or services of benefit to the general public. Although the sponsors' participation on some of these projects may be executed under contract between the sponsor and a contractor, the participation of the Work Projects Administration in a project so operated is on a "force account" basis and the contractor is recognized only as a representative of the sponsor.

—Selection of Projects.

The Work Projects Administration, in cooperation with sponsors, is responsible for selecting projects for operation which offer the greatest degree of public usefulness consistent with the employment of certified workers in the area. The fact that sponsors may in some instances provide personnel for project supervision does not relieve the Work Projects Administration of responsibility for the efficient and safe operation of WPA projects and the enforcement of all WPA rules and regulations.

—Functional Responsibility.

The Work Projects Administration is responsible for the general supervision of WPA projects. While the responsibility of direct supervision of a project is usually vested in the Work Projects Administration, this responsibility may be delegated to the sponsor. For purposes of this section, direct supervision shall be construed as carrying responsibility only for the execution of a specific task or series of tasks in accordance with WPA policies administered under general supervision. The Work Projects Administration also is responsible for the selection and assignment of WPA employees, timekeeping for WPA employees, payment of WPA employees, labor relations, accident prevention, providing for medical care and compensation for WPA employees injured in the line of duty, and for the care and disposition of Federal property and such sponsors' property as may be accepted into custody by the Work Projects Administration.

—Project Plans and Specifications.

The development of a general plan of operation of a project is the joint responsibility of the Work Projects Administration and the sponsor. In the case of construction projects, the Work Projects Administration does not assume responsibility for such matters as explorations, designs, plans, obtaining easements, specifications, lay-outs, or the establishment of grades or levels.

2.5.001

APPENDIX 3 (h)

However, it is expected that these will be checked in detail by WPA engineers or by appropriate specialists as to adequacy for the specific purpose, and that any found not to be in accord with good practice shall be called to the attention of the sponsor for review before work based on them is undertaken. Furthermore, work shall not be initiated until all proposed practices meet with the approval of the WPA engineers or specialists. The efficiency of WPA project operations and the usefulness of completed facilities to the general public are dependent upon the adequacy of plans and specifications furnished by the project sponsor and the timely fulfillment of obligations either assumed by the sponsor or which the sponsor may reasonably be expected to assume in view of the public benefit accruing to the community.

—Sponsors' Participation.

Funds appropriated to the Work Projects Administration are available primarily for the payment of wages to persons who are certified as in need. Since WPA expenditures for nonlabor purposes are limited, the character and efficiency of the work program supervised or operated by the Work Projects Administration is largely dependent upon the ability and willingness of project sponsors to supply funds, services, materials, and equipment promptly in accordance with the agreement in the project proposal and as required for project operations.

APPENDIX 3 (i)

Sponsor's Responsibility and Authority

Authority and Responsibility of Sponsor.

A sponsor of a WPA project must have legal authority to engage in the work embraced by the project and in the area covered. The sponsor shall further be responsible for the continued public use or benefit of the facility or service provided by the project sponsored.

—Services To Be Furnished by Sponsor.

The sponsor shall be responsible in the case of construction projects for the adequacy and promptness of such technical services as plans, specifications, lay-outs, grades, and levels as may be necessary or required for efficient project operation and, in the case of all projects, to the extent required by the limitations on expenditure of WPA funds for such purposes. He also shall be responsible for meeting the expense of such personal and nonpersonal services as are essential for the efficient operation of the project. Where reports or certifications from sponsors are required, sponsors are expected to prepare and transmit such reports and certifications promptly and accurately.

—Responsibility for Completion of Work.

As facilities and services provided through the operation of a WPA project accrue to the benefit of the sponsoring agency, it is required that the sponsor assume responsibility for bringing to a useful conclusion all units of work started, in the event that WPA funds are not available for the completion of such units. Within the limits of funds available, the Work Projects Administration will make every effort to complete units of work which have been undertaken, provided the sponsor fulfills his responsibilities relating to the prosecution of the work.

—Sponsor's Supervision.

The Work Projects Administration shall not delegate to the sponsor the responsibility for direct project supervision unless the sponsor has made provision for adequate and competent supervising personnel. Such personnel shall be qualified by training and experience in the field of the project activity and shall be acceptable to the appropriate representative of the Work Projects Administration.

— —WPA Representative.

Where a project is to be operated under the direct supervision of the sponsor, a WPA representative shall be assigned to the project in a capacity which carries authority to insure observance of WPA rules and regulations with respect to the specific project, and such responsibility of the WPA representative shall be specifically defined and understood by all parties concerned. The sponsor's supervisory personnel shall be responsible to such WPA representative for conducting the project in conformity with the project authorization and all applicable WPA rules and regulations. The sponsor's supervisor shall be employed sufficiently in advance of the starting of the project to permit the preparation by him and the WPA area supervisor of the work schedule, as required by the instructions prescribed on pages 2.5.010-2.5.011.

— —Authority of Sponsor's Supervisor.

Where direct supervision of project operations is being exercised by the sponsor, the sponsor's supervisory personnel shall have authority to plan the manner in which the work shall be prosecuted and the methods and sequence of operations which shall be followed, subject to the review of the appropriate operating division and subject to such limitations as may be fixed on the scope and extent of the work approved for operation by the WPA operating division having jurisdiction. In such cases the sponsor's supervisor shall designate the duties to be performed by such WPA superintendents and foremen, except the WPA representative assigned to the project, and shall approve all requests for labor, materials, and equipment.

Where the Work Projects Administration provides general technical supervision of a professional and service type of activity, and the technical supervision

MR. MARSH: I have no further question.

MR. KORNEGAY: No questions.

WITNESS EXCUSED.

- - - - - - - - - -

MRS. KENNEDY: Your Honor, the defendants would like now to introduce our exhibits into evidence.

THE COURT: Which ones?

MRS. KENNEDY: Exhibit 1, Exhibit 2, Exhibits 3, 4, and 5.

MR. KORNEGAY: OBJECTION.

THE COURT: OVERRULED.

(The exhibits previously marked for identification DEFENDANTS' EXHIBITS 1, 2, 3, 4, and 5, introduced in evidence.)

- - - - - - -

MYRTLE D. COBB, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MRS. KENNEDY:

Q Will you state your name and address, please?

A I am Myrtle D. Cobb. I am deputy clerk in the Federal Court in Greensboro.

Q As Deputy Clerk in the Federal Court here in Greensboro, is it part of your duty to keep public records?

A Yes, it is.

Q Do you have a record in the case of Simkins, et al, vs. Gillespie Park Golf Course, et al?

A This is the case. It is all the original papers that went up to the Court of Appeals that was filed in our office.

Q Were the findings of fact part of that record?

A Yes.

MRS. KENNEDY: Your Honor, at this time we'd like to offer into evidence a decree, the findings of fact, conclusions of law and opinion, as rendered by the Judge of the Federal Court, Middle District of Greensboro.

MR. KORNEGAY: OBJECTION.

THE COURT: Do you have anything further that you want to introduce in regard to that?

MRS. KENNEDY: In addition to that, we have the opinion of the Circuit Court of Appeals on this case.

MR. KORNEGAY: OBJECTION.

THE COURT: Let the record show that is being offered in evidence. I will rule on it later.

(The documents referred to were marked for identification DEFENDANTS' EXHIBITS 6 and 7.)

THE COURT: Anything else?

MRS. KENNEDY: Not with this witness, your Honor.

FILE COPY

Office-Supreme Court, U.S.
FILED
SEP 15 1959
JAMES R. BROWNING, Clerk

In The
Supreme Court of The United States

October Term, 1959

No. 7

LEON WOLFE, GEORGE SIMKINS, JR., JOSEPH STURDIVENT, SAMUEL MURRAY, and ELIJAH H. HERRING,

Appellants,

vs.

STATE OF NORTH CAROLINA

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

BRIEF IN BEHALF OF THE STATE OF NORTH CAROLINA, APPELLEE

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Appellee.

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In The
Supreme Court of The United States

October Term, 1959

No. 7

LEON WOLFE, GEORGE SIMKINS, JR., JOSEPH STURDIVENT, SAMUEL MURRAY, and ELIJAH H. HERRING,

Appellants,

vs.

STATE OF NORTH CAROLINA

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

BRIEF IN BEHALF OF THE STATE OF NORTH CAROLINA, APPELLEE.

OPINION BELOW

The Opinion of the Supreme Court of North Carolina from which this appeal was filed is reported as STATE v. COOKE, et al, 248 N. C. 485, 103 S. E. 2d 846. This Opinion appears in the Transcript of Record filed in this Court on October 22, 1958, beginning on p. 107. This Opinion was filed by the Supreme Court of North Carolina on June 4, 1958, and the Judgment of the Supreme Court of North Carolina making the Opinion effective was also filed on the same date (R-118). The Judgment and Opinion affirmed the Judgment of the Superior Court of Guilford County entered on February 10, 1958 (R-26). This Court postponed further consideration of the question of jurisdiction until the hearing of the case on the merits (R-140).

This case was before the Supreme Court of North Carolina on a former trial, and the Supreme Court of North Carolina arrested judgment in favor of the Appellants because of defects in the warrant upon which the Appellants were tried. The opinion on this trial was filed June 28, 1957, and the case is reported as STATE v. COOKE, et al, 246 N. C. 518, 98 S. E. 2d 885. This Opinion is also set forth in the Statement as to Jurisdiction filed by the Appellants on p. 55, which Statement as to Jurisdiction is designated as being October Term, 1958, No. 466.

JURISDICTION

The Appellants invoked the jurisdiction of the Court under 28 USC 1257(2). Appellants further contend that if they are mistaken in their contention as to their right to come to this Court by direct appeal from the judgment of the Supreme Court of North Carolina, then the Appellants say that the appeal papers should be treated as a Petition for Certiorari under 28 USC 2103.

The Appellee, State of North Carolina, contends that on the Record in this case no substantial Federal question has been presented, that no Federal question was timely or properly raised by the Appellants before the Trial Court and that no Federal question was expressly passed upon by the Supreme Court of North Carolina. The contentions of Appellee, State of North Carolina, on the question of jurisdiction are set forth in its Motion to Dismiss, filed at the October Term, 1958, No 466, in this case. The Appellee, State of North Carolina, again renews its Motion to Dismiss this case for the reasons set forth in said Motion. It is believed by the Appellee that the Transcript of Record in this case will show that the Supreme Court of North Carolina decided this case strictly on an interpretation of a State statute, and the Record will further show that it was conceded by the Appellee at all times that the Appellants could not be excluded from the golf course in question because of their race or color.

STATE STATUTE

The Appellee, State of North Carolina, does not concede

that any substantial Federal question has been properly raised by the Appellants as to the validity of the State statute (Sec. 14-134, General Statutes of North Carolina) under which the Appellants were indicted and convicted. We believe this Court will agree when it examines the full Record and Transcript, as well as the Opinion of the Supreme Court of North Carolina, that the State Court did not pass upon any such constitutional question. However, the Appellants having been indicted and convicted under this statute, we quote it below:

> "If any person, after being forbidden to do so, shall go or enter upon the lands of another without a license therefor, he shall be guilty of a misdemeanor and on conviction shall be fined not exceeding $50.00 or imprisoned not more than 30 days."

The statute is designed to protect possession regardless of whether the possession is actual or constructive (STATE v. BAKER, 231 N. C, 136, 56 S. E. 2d 424). Regardless of any question of the constitutional validity of the above quoted statute on its face, it is the contention of the Appellee that the Appellants have not properly raised any Federal question as to the application of the statute to them.

CONSTITUTIONAL PROVISIONS

The Appellee, State of North Carolina, does not concede that any Federal question has been decided by the Supreme Court of North Carolina nor that any Federal question involving the Constitution of the United States has been properly raised by the Appellants. Since, however, the Appellee will be required to answer arguments based upon the second paragraph of Article VI of the Constitution of the United States and Sec. 1 of the Fourteenth Amendment of the Constitution of the United States, we quote these provisions below, as follows:

"Article VI, Second Paragraph

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all

Treaties made, or which shall be made; under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary nothwithstanding."

"Fourteenth Amendment, Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

The Appellee, State of North Carolina, submits the following as the questions presented upon this appeal:

1. Should the appendixes of Appellants' Brief be disregarded and stricken by this Court because of irrelevant and immaterial matter which was never introduced in evidence, was never a part of the record, and was never presented to the trial court or the Supreme Court of North Carolina?

2. Did the Supreme Court of North Carolina pass upon and determine any Federal question that would confer jurisdiction upon this Court?

3. Is the defense of former jeopardy available to the Appellants on the Record in this case?

4. Does the Rule of Collateral Estoppel apply to the facts as disclosed by the Record in this case?

5. Does the Supremacy Clause of the United States Constitution have any application in favor of the Appellants upon the Record in this case?

6. Is there any evidence that the Appellants have been deprived of any rights or privileges guaranteed by Section 1 of the Fourteenth Amendment of the Constitution of the United States?

7. Does the doctrine of judicial notice relieve the Appellants from introducing into evidence the record of the case tried in the Federal District Court?

STATEMENT OF THE CASE

There have been two trials in this case both of which have been passed upon by the Supreme Court of North Carolina. The Appellee gives a narrative, or summary, of the events connected with this case, as follows:

1. The Appellants are five colored citizens residing in Greensboro, North Carolina. The Appellants were originally indicted upon warrants issued from the Greensboro Municipal-County Court upon charges of violating Sec. 14-134 of the General Statutes of North Carolina (see p. 3 of this Brief where this Statute is quoted).

2. These warrants charged Appellants with a criminal trespass upon the property of "Gillespie Park Golf Course". The Appellants were found guilty in the Municipal-County Court on February 6, 1956, and appealed to the Superior Court of Guilford County which is a Court of general jurisdiction.

3. In the Superior Court the cases were consolidated for trial, and after the State had introduced its evidence it was allowed to amend the warrants so as to charge the trespass as having been committed on the property of "Gillespie Park Golf Club, Inc." instead of "Gillespie Park Golf Course" as formerly charged. The jury, in the Superior Court returned a verdict of Guilty and Appellants appealed to the Supreme Court of North Carolina.

4. The Supreme Court of North Carolina decided (STATE v. COOKE, et als, 246 N. C. 518, 98 S. E. 2d 885) that the trial

court erred in allowing the State to amend the warrant as set out above and such amendment was a fatal variance, and judgment against the Appellants was arrested. The Opinion of the Supreme Court in the above trial was filed on June 28, 1957.

5. The first trial started on December 3, 1956, and while this first case was pending in the Supreme Court of North Carolina the Appellants instituted an action in the United States District Court for the Middle District of North Carolina against the City of Greensboro, the Greensboro City Board of Education and the Gillespie Park Golf Club, Inc. (SIMKINS v. CITY OF GREENSBORO, 149 F. Supp. 562). The Opinion of the District Judge in this case was filed on March 20, 1957, and the case was affirmed by the Circuit Court of Appeals for the Fourth Circuit on June 28, 1957, which is the same date that the Supreme Court of North Carolina filed its Opinion on the first appeal (CITY OF GREENSBORO v. SIMKINS, 246 F. 2d 425).

6. If this Court will refer to the two Opinions filed by both the District Court of Appeals and the Circuit Court of Appeals, it will see that there is no recital of evidence or findings of fact in these two Opinions. The substance of these two Opinions is that plaintiffs cannot be denied equal privileges to the use of the golf course on account of race and color, and that the parties defendant would be subjected to a decree restraining them from discriminating against the plaintiffs on account of race or color. We will discuss the racial aspects of the case later on but here it is sufficient to say that the Appellee, State of North Carolina, has never denied the right of colored citizens to play on this golf course, provided they become eligible as members on the same basis as white citizens. The Appellee, State of North Carolina, was not a party to the cases in the Federal Courts and was not served with a restraining order.

7. On the 2nd of December, 1957, the Appellants were again indicted on new warrants issued from the Greensboro Municipal-County Court again charging a violation of Sec. 14-134 of the General Statutes of North Carolina, relating to

Criminal Trespass, and heretofore quoted in this Brief (see R-2-23 for warrants). The Appellants had previously been indicted on bills of indictment found by the Grand Jury of the Superior Court of Guilford County (R-36) but the prosecuting officer, upon motion, caused a nol-pros with leave to be entered in these cases and tried the Appellants upon the warrants because the Greensboro Municipal-County Court had original and exclusive jurisdiction of this offense. This procedure is in accordance with State practice.

8. The Appellants moved to quash the warrants in the Municipal-County Court. These motions being overruled, they entered pleas of Not Guilty, and upon being convicted the Appellants appealed to the Superior Court of Guilford County where the cases were consolidated for trial and were heard at the February 3, 1958 Criminal Term of the Superior Court of Guilford County. The Appellants renewed their Motions to Quash (R-32) and these Motions were overruled by the Court. The Appellants were found Guilty by the jury and again appealed to the Supreme Court of North Carolina which found no error in the trial below in its Opinion filed June 4, 1958 (STATE v. COOKE, et al., 248 N. C. 483, 103 S. E. 2d 846). This Opinion also appears at R-107, and it is from this Opinion and the decree entered thereon which is the subject of this appeal (Judgment of Supreme Court appears at R-118).

9. If the Court will examine the Motion to Quash (R-32) it will see that the Appellants do not attack directly the constitutionality of Sec. 14-134 of the General Statutes but Appellants complain of the administration of the statute in view of the decision in the Federal Court and because of the Supremacy Clause of the United States Constitution. The Appellants further invoked the doctrine of Collateral Estoppel and alleged that under the circumstances of this case they were placed in jeopardy contrary to the Constitution of the United States. Further on we will show the Court that they have now raised for the first time in their Brief filed in this Court alleged constitutional objections which were not raised before the trial court or the Supreme Court of North Carolina.

10. If this Court will read the evidence which begins on R-43 and extends through R-78, it is believed that the Court will arrive at the conclusion that the Appellants were not excluded from the golf course because of race or color but were simply excluded because they were not members of the Golf Club in any capacity and for which reason any person would be excluded regardless of race or color.

SUMMARY OF ARGUMENT

The Appellee, State of North Carolina, summarizes its argument as follows:

(a) The Appellants' Brief contains certain burdensome, irrelevant and immaterial matter which Appellee contends is contrary to Rule 40(5) of the Rules of this Court. For the most part this matter appears in the appendixes of Appellants' Brief (pp. 80-96). As examples, on pp. 80, 81, 82 of Appellants' Brief appear excerpts from the Brief of the City of Greensboro filed in the case in the Federal Court. Beginning on p. 83 there also appears a newspaper editorial and various newspaper articles relating to this same Golf Course. On p. 89 appears certain minutes of the Greensboro City Council and on p. 90 there appears a part of the Manual of Rules and Regulations of the Works Progress Administration. In the Brief there appears on pp. 6, 7, 13 and other places, quotations of the Findings of Fact made in the case in the Federal District Court.

This material was never introduced in evidence before the trial court and was never before the Supreme Court of North Carolina. This material does not appear in the Transcript of Record filed in this Court and does not appear in the original or State Record. We believe that this Court desires to judge the State and its Supreme Court fairly and that this Court will not make the State and its Supreme Court responsible for materials which were never before the State Supreme Court and never considered by it. The Appellee will incorporate in this Brief a Motion to the effect that this matter be disregarded by the Court and that it be stricken from the Brief of Appellants.

(b) The Appellee will argue that the Supreme Court of North Carolina did not decide any Federal question, at least of a substantial nature, which would confer jurisdiction upon this Court. As we understand the matter, the question of jurisdiction is still open for consideration, having been reserved until final disposition of this case. We refer the Court to our Motion to Dismiss, filed in this cause at the October Term, 1958, No. 466, and bearing the same title as this appeal.

First, it is the contention of Appellee that the evidence in this Record shows that no racial discrimination was involved in excluding the Appellants from the golf course. The evidence beginning on R-72 shows the Bylaws of the Club and the requirements of membership. The evidence beginning on R-46 shows the Manager's concepts of eligible members. The Supreme Court of North Carolina, as well as the Trial Judge, were well aware that constitutionally the Appellants could not be excluded from the use of the golf course because of race or color (HOLMES v. CITY OF ATLANTA, 350 U. S. 879, 76 S. Ct. 141, 100 L. ed. 876). Color alone does not dispense with eligibility conditions (FRASIER v. BOARD OF TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA, 134 F. Supp. 589—3-Judge District Court).

The Appellants did not properly introduce into evidence findings of fact and the judgment in the case of SIMKINS v. CITY OF GREENSBORO, 149 F. Supp. 562, and even if they had introduced the judgment in evidence it would not have resulted in any estoppel or collateral estoppel which would have prevented the State from exercising its sovereign power of criminal prosecution. It is believed that the cases on collateral estoppel, where it is applicable, are decisions of the courts of one sovereignty and that no cases can be produced showing the application of the doctrine as originating in one sovereignty and being applied in another sovereignty. This being true there is no room for application of the Supremacy Clause of the Federal Constitution. When it is applicable the Supreme Court of North Carolina recognizes the Supremacy Clause (CONSTANTIAN v. ANSON COUNTY, 244 N. C. 221, 93 S. E. 2d 163). Appellants were required to present any

constitutional question in the State courts according to State practice, and the procedure of North Carolina is liberal in the presentation of such questions (JOHN v. PAULLIN, 231 U. S. 583, 585, 58 L. ed. 381, 383). We furthermore call the Court's attention to the fact that Appellants do not attack the validity of the statute but attempt to attack the authority exercised under it and that the mere objection to the exercise of authority under a statute whose validity is not attacked cannot be made the basis of an appeal (WILSON v. COOKE, 327 U. S. 474, 90 L. ed. 793).

It is the contention of Appellee that there is no substantial question as to former jeopardy because of a variance in the bill of indictment or warrant, the arresting of judgment and trial upon a proper warrant (HILL v. TEXAS, 316 U. S. 400, 86 L. ed. 1559, 1563). This is in accord with the holdings of the Supreme Court of North Carolina (STATE v. HICKS, 233 N. C. 511, 64 S. E. 2d 871, cert. den. 342 U. S. 381, 96 L. ed. 629). There is, therefore, no substantial question as to former jeopardy. Constitutional rights must be seasonably raised in accordance with the requirements of State Law (EDDLEMAN v. CALIFORNIA, 344 U. S. 357, 97 L. ed. 387).

The Appellants' complaint as to multiple criminal proceedings that cause fundamental unfairness or which unduly harass an accused was not raised in the trial court nor was such question raised before the Supreme Court of North Carolina. The Appellants' complaint of a lack of standards in the eligibility requirements for playing on the golf course was not presented to the trial court and was never presented to the Supreme Court of North Carolina. The appellants' complaint as to the Rules of Evidence of the State of North Carolina, which, it says, close the mouths of key witnesses, was never presented to the trial court and was never passed upon by the Supreme Court of North Carolina. The Appellants' complaint that the Supreme Court of North Carolina for the first time held that the Criminal Trespass statute should be applied to public lands is not correct because the statute is directed towards a violation of possession, but even if the Supreme Court of North Carolina held that if applied

to the lands possessed in this case no constitutional question would be raised because Appellants have no vested right in any present decision or prior decision of an appellate court. Objections to the competency or relevancy of evidence in a State court involve the action of the general or local law of evidence and furnish no ground to support a Federal question (BUCHALTER v. NEW YORK, 319 U. S. 427, 87 L. ed. 1492).

The above Summary of Argument all relates to the proposition that no substantial Federal question was passed upon by the trial court or by the Supreme Court of North Carolina and that the case was disposed of by the Supreme Court of North Carolina on adequate State grounds without any attempted evasion of any Federal question. It is true that in its Opinion the Supreme Court of North Carolina cited certain Federal cases in which it was held that golf club property could not be denied in its use to persons simply because they were Negroes (DAWSON v. MAYOR AND CITY COUNCIL OF BALTIMORE CITY, 220 F. 2d 386; LAWRENCE v. HANCOCK, 76 F. Supp. 1004; TATE v. DEPARTMENT OF CONSERVATION & DEVELOPMENT, 133 F. Supp. 53) and that this case did not question the soundness of the legal principles set forth in the Federal cases. This is not to be understood as deciding any Federal question because this Court "reviews judgments, not statements in opinions." (BLACK v. CUTTER LABORATORIES, 351 U. S. 292, 100 L. ed. 1188, 76 S. Ct. 824) Furthermore, it is the Appellee's contention that the Appellants could easily have raised all the constitutional questions desired on motions of judgment as of nonsuit (STATE v. McGEE, 237 N. C. 633, 75 S. E. 2d 783) had they simply stated the grounds of their constitutional attack which would have been recorded by the court reporter and Appellants would not even have had to file a motion in writing. Instead of this, Appellants chose to present their questions by means of a motion to quash and by motion in arrest of judgment, which, under local State practice, applies only to defects appearing on the face of the record (STATE v. COCHRAN, 230 N. C. 523, 53 S. E. 2d 663; STATE v. GASTON, 236 N. C. 499, 73 S. E. 2d 311).

(c) From a substantive standpoint the defense of former jeopardy is not presented according to State practice since it cannot be considered on a motion in arrest of judgment or a motion to quash but must be a special plea (STATE v. MORGAN, 95 N. C. 641; STATE v. DAVIS, 223 N. C. 54, 25 S. E. 2d 164). Former jeopardy, or the right not to be placed twice in jeopardy for the same offense, is not a guarantee protected by the Fourteenth Amendment (STATE v. HICKS, 233 N. C. 511, 64 S. E. 2d 871, cert den. 342 U. S. 381, 96 L. ed. 629) and the Fifth Amendment in this respect is not incorporated in the Fourteenth Amendment. This Court is in accord with the ruling that the quashing of a bill of indictment for a variance does not prevent trial later on on a good or valid bill of indictment (STROUD v. UNITED STATES, 251 U. S. 15, 64 L. ed. 103).

(d) As to whether or not defendants shall be given the benefit of estoppel or collateral estoppel alleged to have been created or arising on issues or judgment in another case, this Court has said that this is not a constitutionally protected requirement (HOAG v. NEW JERSEY, 356 U. S. 464, 2 L. ed. 2d 913, 78 S. Ct. 829). The fact that the State of North Carolina recognizes the doctrine of collateral estoppel does not mean that it applies in a criminal case in the State Court as to questions adjudicated in a civil action in a Federal court and as we have shown, the Appellants must have introduced evidence, even if such plea is available, showing the identity of the questions determined, and this the Appellants did not do. Under local State practice any objection to records offered in evidence which is sustained must contain the records as a part of the exceptions sent to the Supreme Court of North Carolina so that Court may pass upon the question. The record does show (R-79) that the trial court excluded Exhibits Nos. 6 and 7 but Exhibits Nos. 6 and 7 were never sent to the Supreme Court of North Carolina as a part of the case on appeal or in any other proper manner so that that Court could know and pass upon same. It should be noted that the Appellants themselves made up their own case on appeal, which was agreed to by the prosecuting officer (R-106).

(e) In view of the fact that it was conceded by all parties that the Appellants could not be excluded from the golf course because of race or color and the trial court also stated this to the jury in its instructions, and, further, in view of the fact that the case was tried strictly on the question of a criminal trespass by invading the possession of the incorporated golf club (STATE v. BAKER, 231 N. C. 136, 56 S. E. 2d 424) there was no Federal point involved which brought into focus the Supremacy Clause of the United States Constitution. This is especially true since the Federal record was never introduced in evidence, and the Supreme Court of North Carolina never had the Federal record before it for consideration.

(f) The Appellants have not been deprived of any rights or privileges guaranteed by Sec. 1 of the Fourteenth Amendment. The question of multiple prosecutions was not passed upon by the State courts, and the validity of the regulations and qualifications for membership in the golf club were not passed upon by the State courts nor was the question as to whether the Trespass Statute of the State did or did not apply to public lands. Since this Court is reviewing on appeal the action of a State court this Court will only consider questions passed upon below (WHITNEY v. CALIFORNIA, 274 U. S. 357, 47 S. Ct. 641, 71 L. ed. 1095).

(g) Appellee will argue that the doctrine of Judicial Notice does not come to the aid of the Appellants in this case. The Supreme Court of North Carolina cited many cases in its Opinion showing that where two courts are involved in actions which may involve the same questions or issues neither court would be bound to take notice of the judgment in the other court judicially (SCHULER v. ISRAEL, 120 U. S. 506, 30 L. ed. 707). The Appellee will cite other cases in its substantive argument showing that the Supreme Court of North Carolina was correct in its position that it could not take judicial notice of the evidence, findings of fact and judgment of the Federal District Court for the purposes of creating an estoppel or a collateral estoppel in favor of the Appellants in the State Court.

ARGUMENT

1

THE SUPREME COURT OF NORTH CAROLINA DECIDED THIS CASE ON AN INDEPENDENT, ADEQUATE AND TENABLE NONFEDERAL GROUND, AND THERE IS NO FEDERAL QUESTION FOR THE REVIEW OF THIS COURT.

A

The Appellants did not properly present a Federal question before the trial court or before the Supreme Court of North Carolina according to rules of State practice.

We think that the efforts of Appellants to raise a Federal question based upon alleged violations of rights protected by the Federal Constitution, and especially those guaranteed by the Fourteenth Amendment, must be tested according to the validity of the Motion to Quash (R-32) and the Motion to set aside the verdict, arrest judgment and grant the Defendants a new trial (R-91).

An analysis of the Appellants' Motion to Quash shows that Appellants contend that the Criminal Trespass Statute, 14-134 of the General Statutes, was unconstitutionally applied to them for the following reasons:

(1) The statute in its application to Appellants violated the Supremacy Clause of the United States Constitution in that it made a crime out of acts which the Federal District Court and the United States Court of Appeals for the Fourth Circuit held to be protected by the Fourteenth Amendment. The Appellants in Paragraph 1 of the Motion to Quash give a narrative of the case decided in the Federal District Court, state that they have subpoenaed the Clerk of the United States District Court for the Middle District to bring the full record and judgment roll and that they will offer it in evidence. When this is done Appellants say that this should estop the State from proceeding with the prosecution and

that if this is not done the judgment in the Federal Court will be nullified contrary to the Supremacy Clause. The Court will note that this whole argument is built upon the reception in evidence of the trial court of the record and judgment roll of the Federal Court.

(2) The Appellants say that they cannot be tried on the warrants issued and served upon them because bills of indictment were returned by the Grand Jury charging the same identical crime and that this procedure is not in conformity with the Opinion of the Supreme Court of North Carolina issued in the first trial.

(3) The Appellants say that to require them to stand trial on the warrants would be to place them in double jeopardy in violation of the Fifth Amendment to the Constitution as incorporated in the Fourteenth Amendment.

(4) The Appellants say that there is a fatal variance in the warrants because one of the defendants was designated as "George Simkins", whereas the person sought to be charged is "George Simkins, Jr."

When we consider the Motion to Set Aside the Verdict, Arrest Judgment and Grant a New Trial, we find that the Appellants assigned the following grounds:

(1) They incorporate in the Motion the same grounds set forth in the original Motion to Quash.

(2) Appellants allege that the Supremacy Clause of the Federal Constitution requires the Court to take notice of and enforce the judgment rendered by the Federal District Court and further allege that punishing the Apellants criminally on the same set of facts as that considered in the Federal District Court would nullify the Federal decree and injunction.

(3) Appellants quote from the Opinion of the Federal District Judge and then ask the Court to take judicial notice of matters of common knowledge which the Federal District

Judge referred to in his Opinion, and Appellants then allege that to permit the verdict to stand would violate the rights of the Appellants protected by the Fourteenth Amendment.

(4) Appellants quote from the Findings of Fact and say that they are made a part of the decree and thereby a part of the record and judgment roll and that the State Court must give effect to it and especially to Finding of Fact No. 33, which is quoted. Appellants quote again from another Finding of Fact and say that the State Court should set aside the verdict because it is in conflict with the quoted portion of the Opinion of the District Judge.

(5) Appellants say that the land on which the golf course is situated is not private property, and, therefore, that the Trespass Statute does not apply, and to support this Appellants quote Finding of Fact No. 30 of the Federal District Judge in the civil action. In addition, Appellants suggest that they being taxpayers of Greensboro they had a license to go upon said lands and that this removed them from the application of the Trespass Statute.

(6) Appellants contend that the trial court erroneously instructed the jury as to the bylaws of the golf club in that they do not regulate eligibility of members but regulate only the use of the golf course and that the trial court, therefore, gave the jury the impression that the Trespass Statute made it a misdemeanor to violate the rules and regulations governing the use of public land.

It is clear that Appellants have misconceived the function and use of the motions which they have attempted to use in order to raise the questions which they sought to present. North Carolina is a very liberal State in its procedure for raising constitutional questions in criminal cases. A motion to quash and a motion in arrest of judgment may both be used where the alleged constitutional defects appear on the face of the record. This is explained by the Supreme Court of North Carolina in the case of STATE v. COCHRAN, 230 N. C. 523, 53 S. E. 2d 663, where in discussing the functions of these motions, the Supreme Court of North Carolina said:

"The only exceptions and assignments of error in the record are directed to the alleged error of the court in (1) overruling the motion to quash, (2) overruling the motion in arrest of judgment, and (3) pronouncing judgment on the verdict.

"A motion to quash lies only for a defect on the face of the warrant or indictment. *S. v. Turner*, 170 N. C. 701, 86 S. E. 1019. The defect must appear on the face of the record. *S. v. Choate*, 228 N. C. 491, 46 S. E. 2d 476; *S. v. Davenport*, 227 N. C. 475, 42 S. E. 2d 686; *S. v. Callett*, 211 N. C. 563, 191 S. E. 27.

"It must appear from an inspection of the record that no crime is charged, *S. v. Morgan*, 226 N. C. 414, 38 S. E. 2d 166; *S. v. Gardner*, 219 N. C. 331, 13 S. E. 2d 529, or that the warrant or indictment is otherwise so defective that it will not support a judgment. *S. v. Francis*, 157 N. C. 612, 72 S. E. 1041; *S. v. Taylor*, 172 N. C. 892, 90 S. E. 294; *S. v. Gregory*, 223 N. C. 415, 27 S. E. 2d 140.

"The court, in ruling on the motion, is not permitted to consider extraneous evidence. Therefore, when the defect must be established evidence *aliunde* the record, the motion must be denied. *S. v. Brewer*, 180, N. C. 716, 104 S. E. 655.

"A motion in arrest of judgment, though somewhat broader in scope, serves the same purpose as a motion to quash. The motion to quash is directed to patent defects in the pleading while the motion in arrest of judgment is directed to such defect in the pleading, verdict, or other part of the record.

"To afford ground for a motion in arrest of judgment, it must appear that the court is without jurisdiction or that the record is in some respect fatally defective and insufficient to support a judgment. *S. v. Walker*, 87 N. C. 541; *S. v. Phillips*, 228 N. C. 446, 45 S. E. 2d 535; *S. v. Vandellip*, 225 N. C. 610, 35 S. E. 2d 885; *S. v. Chapman*, 221 N. C. 157, 19 S. E. 2d 250; *S. v. Foster*, 228 N. C. 72, 44 S. E. 2d 447; *S. v. Gregory, supra; S. v. Morgan, supra*, and cases cited; *S. v. Lewis*, 194 N. C. 620, 140 S. E. 434; *S. v. Turner, supra; S. v. McKeon*, 223 N. C. 404, 26 S. E. 2d 914.

"Here too, in considering the motion, the Court is con-

> fined to the record and may not consider extraneous facts or circumstances; and 'record', as here used, means the record proper. It does not include the case on appeal. *S. v. Efird*, 186 N. C. 482, 119 S. E. 881.
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> "The facts found by the court below were found on the preliminary hearing on the motion to quash. As it is not permissible to consider them on the motion to quash or on the motion in arrest of judgment, and the evide in respect thereto was not offered on the trial, they c stitute mere surplusage and have no proper place in the record. *S. v. Efird, supra.*"

A motion to quash in North Carolina may be used to raise the question of duplicity in the criminal pleading for this appearance on the face of the record (STATE v. WILLIAMSON, 250 N. C. 204, 108 S. E. 2d 443). A motion to quash can be made where the record shows that the court does not have jurisdiction (STATE v. WILKES, 233 N. C. 645, 65 S. E. 2d 129); where a State statute is directly attacked upon the basis that the statute itself is unconstitutional this can be done by a motion to quash (STATE v. FELTON, 239 N. C. 575, 80 S. E. 2d 625; STATE v. FURMAGE, 250 N. C. 616, ——S. E. 2d ——). A direct attack on a State statute for constitutional reasons may be made by a demurrer to the warrant (STATE v. GLIDDEN CO., 228 N. C. 664, 46 S. E. 2d 860). Examples of the use of motion in arrest of judgment for making various constitutional attacks where the defects appear on the face of the record are shown in the cases of STATE v. DOUGHTIE, 238 N. C. 228, 77 S. E. 2d 642; STATE v. GASTON, 236 N. C. 499, 73 S. E. 2d 311. In the case of STATE v. GASTON, the Supreme Court of North Carolina discusses a motion in arrest of judgment and explicitly holds that defects which appear only by the aid of evidence cannot be the subject of such a motion. It said:

> "A motion in arrest of judgment can be based only on matters which appear on the face of the record proper, or on matters which should, but do not, appear on the face of the record proper. *S. v. Sawyer*, 233 N. C. 76, 62 S. E. 2d 515; *S. v. Mitchem*, 188 N. C., 608, 125 S. E. 190; *S. v. Shemwell*, 180 N. C. 718, 104 S. E. 885. The record proper in any action includes only those essential proceedings which are made of record by the law itself, and

as such are self-preserving. *Thornton v. Brady*, 100 N. C. 38, 5 S. E. 910; *State ex rel. May Department Stores v. Haid*, 327 Mo. 567, 38 S. W. 2d 44; 23 C. J. S., Criminal Law, section 1515. The evidence in a case is no part of the record proper. *S. v. Matthews*, 142 N. C. 621, 55 S. E. 342. In consequence, defects which appear only by the aid of evidence cannot be the subject of a motion in arrest of judgment. *S. v. Sawyer, supra; S. v. Robertson*, 210 N. C. 266, 186 S. E. 247; *S. v. McKnight*, 196 N. C. 259, 145 S. E. 281; 23 C. J. S., Criminal Law, section 1526."

The only exception to the rules stated above, as supported by local State decisions, is that an objection to an indictment based on race discrimination in the organization of the Grand Jury may be raised by a motion to quash in which evidence can be used to support the motion but this is by virtue of statute and is, therefore, an exception (MILLER v. STATE, 237 N. C. 29, 74 S. E. 2d 513; STATE v. SPELLER, 229 N. C. 67, 47 S. E. 2d 537; STATE v. PERRY, 248 N. C. 334, 103 S. E. 2d 404). A part of Sec. 9-26 of the General Statutes reads as follows: "All exceptions to grand jurors for and on account of their disqualifications shall be taken before the jury is sworn and empaneled to try the issue, by motion to quash the indictment, and if not so taken, the same shall be deemed to be waived." The Court will find another illustration of the function of a motion in arrest of judgment in the case of STATE v. BANKS, 247 N. C. 745, 102 S. E. 2d 245.

The simplest and easiest manner in which to raise constitutional questions which do not appear on the face of the record and for the support of which evidence must be introduced outside of the record is shown by the case of STATE v. McGEE, 237 N. C. 633, 75 S. E. 2d 783 where it will be seen that all that counsel is required to do is to dictate the grounds of the constitutional attack when motion is made for judgment as of nonsuit, which grounds are taken down by the court reporter, and when the motion is made at the conclusion of the State's evidence the defendant, or appellant, may introduce evidence to support his grounds of constitutional attack and may renew his motion at the close of all the evidence. It is submitted that any constitutional ques-

tion may be raised under this type of motion with specific grounds stated or dictated to the court reporter and that the motion does not even have to be in writing.

We have gone into all these phases of local State practice in order to show that when the Supreme Court of North Carolina said in the opinion in this case that under a motion to quash "the court, in ruling on the motion, is not permitted to consider extraneous evidence. Therefore, when the defect must be established by evidence *aliunde* the record, the motion must be denied", the Supreme Court of North Carolina was not inventing any new rules to be followed against these Appellants but was following well-established, criminal procedure of the State.

As to the defense of estoppel, or more properly collateral estoppel, which the Appellants attempt to raise in the Motion to Quash, it should first be stated that we are unable to find any holding or ruling of this Court to the effect that collateral estoppel is a constitutional requirement. On the other hand, this Court has expressed grave doubts (HOAG v. NEW JERSEY, 356 U. S. 464, 2 L. ed. 2d 913, 78 S. Ct. 829) as to whether there is any constitutional question in such a defense even when properly set up in the trial court and passed upon by the highest court of the State. In the Hoag case, this Court said:

> "Despite its wide employment, we entertain grave doubts whether collateral estoppel can be regarded as a constitutional requirement. Certainly this Court has never so held."

We have discussed the State procedure in some detail in order to show that this defense was never properly raised according to local State practice. If the Court will refer to R-71 (State Record, p. 69) it will be seen that the Appellants called as a witness the Deputy Clerk of the Federal Court in Greensboro and that she had the original papers, or record, in the Federal case and that she was never examined nor were any of the records introduced in evidence. If the Court will refer to R-79 (State Record, p. 77) the Court will see

that one of the attorneys for the Appellants stated that she would like to have a ruling on "whether or not these would be admissible." The Court stated: "I am going to sustain the objection as to those two exhibits, that is No. 6 and No. 7." We do not know what "these" means. We do not know what Exhibits Nos. 6 and 7 contain. They were never made a part of the Record as an offer of evidence and they were never submitted to the Supreme Court of North Carolina. North Carolina is like a large number of States in that there must be an offer of proof made a part of the Record and brought up for review before the highest appellate court of the State can consider the correctness of a trial court's ruling.

In order to show this Court that this rule has been followed in cases where race questions have not been involved we desire to cite a few cases. In the case of IN RE SMITH'S WILL, 163 N. C. 465, 466, 467; 79 S. E. 977, the Supreme Court carefully explained its rule on such a question, saying:

> "Caveators offered a certain record in a proceeding, said to have involved the sanity of the testator; but the same reason for its exclusion applies as in the case of the objections above noted. We are not informed as to its contents, so that we can see its relevancy and give an intelligent opinion as to the validity of the exception now made to the ruling. We may add these authorities to those already cited upon the general question that the party asking the question, which is excluded, must disclose to the court what he expects to prove by the witness. *Overman v. Coble*, 35 N.-C. 1; *S. v. Pierce*, 91 N. C. 606; *Boney v. R. R.*, 155 N. C. 95; *Whitmire v. Heath*, 155 N. C. 304. The same rule prevails in other jurisdictions. *In re Pinney's Will*, 27 Minn., 280. We said in *Whitmire's case*: 'A court cannot pass intelligently upon evidence unless it knows what it is, in order that its bearing upon the issue may be determined. The defendant should have stated what he expected to prove, otherwise the question was properly excluded, not because it is incompetent, but because it cannot be seen that it is. The Court must judge of its competency and materiality —not the counsel. This is the well settled practice and the rule of reason.' *It also applies to papers and records offered in evidence, as will appear by reference to S. v. Pierce, supra, and Fulwood v. Fulwood, 161 N. C. 601.*" (Emphasis ours)

There are many other cases which sustain this same proposition (PROFFITT v. INSURANCE C., 176 N. C. 680, 682, 97 S. E. 635; WALKER v. COOPER, 159 N. C. 536, 539, 75 S. E. 727; STATE v. CHOATE, 238 N. C. 491, 496, 46 S. E. 2d 476; STATE v. KNIGHT, 247 N. C. 754, 760, 102 S. E. 2d 259). The Supreme Court of North Carolina has followed this rule certainly as far back as 1836 when in the case of BROOKS v. ROSS, 19 N. C. 485, the Court held that it could not consider a deed where there was no statement in the record as to the terms of the deed and the deed had not been offered in evidence or sent up with the record as an offer of proof. The Supreme Court of North Carolina has also held to the same rule where exceptions were made to the charge of the court and the charge was not sent up (STATE v. SIMONDS, 154 N. C. 197, 69 S. E. 790). The Supreme Court of North Carolina is like other courts in that it holds that it is bound by the record before it and cannot pass on questions which are not raised below and shown in the record (STATE v. HAM, 238 N. C. 94, 76 S. E. 2d 346).

As to the State practice on a motion for a new trial and to set aside the verdict, these are matters that are entirely within the discretion of the trial court, and under North Carolina practice a refusal to grant such motion is not reviewable on appeal (STATE v. McKINNON, 223 N. C. 160, 25 S. E. 2d 606; STATE v. CHAPMAN, 221 N. C. 157, 19 S. E. 2d 250; STATE v. WAGSTAFF, 219 N. C. 15, 12 S. E. 2d 657; STATE v. BROWN, 218 N. C. 415, 11 S. E. 2d 321).

We have gone into all these questions of State practice in order to show the Court that the Appellants did not properly raise their constitutional questions and that there was nothing before the Supreme Court of North Carolina requiring it to pass on any Federal constitutional question.

The rights, privileges, or immunities claimed must be set up in the State Court and denied by its decision.

BROOKS v. MISSOURI, 124 U. S. 394, 31 L. ed. 454;

HARTFORD LIFE INS. CO. v. JOHNSON, 249 U. S. 490, 63 L. ed. 722;

KEOKUK & HAMILTON BRIDGE CO. v. ILLINOIS, 175 U. S. 626, 44 L. ed. 299;

MUTUAL LIFE INS. CO. OF NEW YORK v. McGREW, 188 U. S. 291, 47 L. ed. 480;

PARKER v. McLAIN, 237 U. S. 469, 59 L. ed. 1051;

THOMAS v. IOWA, 209 U. S. 258, 52 L. ed. 782;

NEW YORK EX REL. COHN v. GRAVES, 300 U. S. 308, 81 L. ed. 666.

In PARKER v. McLAIN, 237 U. S. 469, 59 L. ed. 1051, on p. 471, it is stated:

> "Our jurisdiction to review the judgment of the highest court of a state turns upon whether a Federal right was specially set up or claimed in that court and denied by its decision."

A claim of jurisdiction in the Supreme Court of the United States to review a decision of a state court cannot be sustained by reference to briefs and statements which are not a part of the record.

ZADIG v. BALDWIN, 166 U. S. 485, 41 L. ed. 1087;

MEDBERRY v. OHIO, 24 How. 413, 16 L. ed. 739;

LYNCH v. NEW YORK, 293 U. S. 52, 79 L. ed. 191.

Of course, a state must furnish fair and reasonable procedure to raise Federal constitutional questions but when the state does furnish such procedure the appellants must use this procedure. This is made clear in the case of EDELMAN v. CALIFORNIA, 344 U. S. 357, 97 L. ed 387, 73 S. Ct. 293, where this Court said:

> "It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law. HULBERT v. CHICAGO, 202 U. S. 275, 50 L. ed. 1026, 26 S. Ct. 617

(1906); MUTUAL LIFE INS. CO. v. McGREW, 188 U. S. 291, 308, 47 L. ed. 480, 484, 23 S. Ct. 375, 63 LRA 33 (1903). Noncompliance with such local law can thus be an adequate state ground for a decision below."

Even if it can be said that the Appellants raised a Federal question in the trial court, such question must be pursued on appeal to the State's highest court in the manner required by local State practice.

Under these circumstances we think the statement of the Court in the case of JOHN v. PAULLIN, 231 U. S. 583, 585, 58 L. ed. 381, 383, is appropriate. This Court there said:

"Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law."

See also:

C. I. O. v. McADORY, 325 U. S. 472, 477, 89 L. ed. 1741;

PARKER v. ILLINOIS, 333 U. S. 571, 92 L. ed. 886;

CENTRAL UNION TEL. CO. v. EDWARDSVILLE, 269 U. S. 190, 70 L. ed. 229;

C. & O. R. CO. v. McDONALD, 214 U. S. 191, 53 L. ed. 963;

HARDING v. ILLINOIS, 196 U. S. 78, 49 L. ed. 394.

In TARRANCE v. FLORIDA, 188 U. S. 519, 47 L. ed. 572, it was held that where the State practice required a plea in abatement instead of a motion to quash that this Court would follow the State practice.

In BAILEY v. ANDERSON, 326 U. S. 203, 207-7, 90 L. ed. 3 this Court said:

"Inspection of the record does not show that, in denying

the writ of error, the state court passed upon any constitutional question not raised or passed upon in the course of the proceedings below. Such appears not to be its practice. Rule 22 of the Rules of the Supreme Court of Appeals, 181 Va lxxv; cf. Ward Lumber Co. v. Henderson-White Mfg. Co. 107 Va 626, 628, 629, 59 S. E. 476, 17 LRA (NS) 324; Bliss v. Spencer, 125 Va. 36, 50, 99 S. E. 593, 5 ALR 619; Reynolds v. Adams, 125 Va. 295, 314, 99 S. E. 695. On this record we cannot say that the interest claimed was not included in the award, or, if it was not, that the Supreme Court of Appeals of Virginia, by denying writ of error, passed upon any question of the constitutionality of such denial of interest, not raised on the record or passed upon below. Unless this affirmatively appears upon the record brought here for review on appeal, this court is without jurisdiction of the appeal. Jacobi v. Alabama, 187 U. S. 133, 135, 136, 47 L. ed. 106-108, 23 S. Ct. 48; Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 309, 47 L. ed. 480, 485, 23 S. Ct. 375, 63 LRA 33; Chicago, I & L. R. Co. v. McGuire, 196 U. S. 128, 131, 49 L. ed. 413, 415, 25 S. Ct. 200. See Flournoy v. Wiener, 321 U. S. 253, 262, 263, 88 L. ed. 708, 714, 715, 64 S. Ct. 548, and cases cited."

In WILLIAMS v. GEORGIA, 349 U. S. 375, 99 L. ed. 1161, this Court said:

"A state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power."

See, also, the following cases:

LAYTON v. MISSOURI, 187 U. S. 356, 47 L. ed. 214;

MORRISON v. WATSON, 154 U. S. 111, 38 L. ed. 927;

BALDWIN v. KANSAS, 129 U. S. 52, 32 L. ed. 640;

BROOKS v. MISSOURI, 124 U. S. 394, 31 L. ed. 454;

SPIES v. ILLINOIS, 123 U. S. 131, 31 L. ed. 80.

B

If the issue of former jeopardy was properly raised it does not involve a Federal question.

The contention that the Fifth Amendment is incorporated in the Fourteenth Amendment, and, therefore, Appellants are constitutionally protected from alleged double jeopardy or former jeopardy is, of course, erroneous (BARTKUS v. ILLINOIS, ——— U. S. ———, 3 L. ed. 2nd 684, 79 S. Ct. ———; BROCK v. NORTH CAROLINA, 344 U. S. 424, 97 L. ed. 456, 73 S. Ct. 349; PALKO v. CONNECTICUT, 302 U. S. 319, 82 L. ed. 288, 58 S. Ct. 149). In North Carolina it is the established authority that no former jeopardy attaches where there is a fatal variance in the bill of indictment (STATE v. HICKS, 233 N. C. 511, 516, 64 S. E. 2d 871; cert. den. 96 L. ed. 629, 342 U. S. 381; STATE v. MILLER, 231 N. C. 419, 57 S. E. 2d 392; STATE v. DRAKEFORD, 162 N. C. 667, 78 S. E. 108; STATE v. SHERRILL, 82 N. C. 694). There is, therefore, no Federal question on this point. Likewise the Supremacy Clause would have no application because no circumstances were presented or passed upon by the Supreme Court of North Carolina which warranted the application of the Clause, and there is no Federal question on this issue.

C

The questions attempted to be raised by the Appellants under the Fourteenth Amendment were not passed upon by the State courts.

The Appellants attempt to raise, for the first time in this Court, certain questions which were not determined by the State court. It is said that there was a lack of standards in the rules and regulations which established membership and entitled persons to play on the golf course. A reference to the Record in this Court, pp. 44, 45, 46, 48, 72, 73, 77, will show what was required for membership and will further show that no condition of race or color prohibited membership. Furthermore, this was not presented to the trial court nor was it passed upon by the Supreme Court of North Carolina.

It is further said that the State Rules of Evidence close the mouths of certain key witnesses, and here again this was not presented to or passed upon by the Supreme Court of North Carolina.

It is further said by Appellants that the Supreme Court of North Carolina held for the first time that this Criminal Trespass Statute applied to public lands. This was a question for the State court to decide; furthermore, the Golf Club Corporation held a lease or an estate for years and had invested about $100,000 in the development of the property. The Criminal Trespass Statute is directed towards a violation of possession and it is not denied that the Golf Club Corporation was in possession of the property. Under the Criminal Trespass Statute a tenant in possession exercises lawful control over land, and the Supreme Court of North Carolina has held that a tenant has such possession which entitles him to invite persons upon the property, and these invited persons are not guilty of willful trespass even though the landlord forbids such persons to enter upon the land (STATE v. LAWSON, 101 N. C. 717, 7 S. E. 905). This was a question of local State law and the decision of the Supreme Court of North Carolina is decisive on the point. Even if the Supreme Court of North Carolina had held for the first time in this case that the Criminal Trespass Statute did apply to public lands this would not create a Federal question because the Appellants have no vested right in prior decisions of the Court (TIDAL OIL CO. v. FLANAGAN, 263 U. S. 444, 450, 451, 44 S. Ct. 197, 198, 68 L. ed. 382; CAROLINA-VIRGINIA RACING ASS'N. v. CAHOON, 214 F. 2d 830, 832).

It is also said that the Appellants were convicted of a crime which they could not with reasonable certainty know that they were committing. If this means that the Appellants are now attacking Sec. 14-134 of the General Statutes for the reason that it does not constitutionally describe a crime with any ascertainable standard, then this question was not raised below or presented to either the trial court or the Supreme Court of North Carolina.

It is also said that because the first warrants were quashed and Appellants were tried again on valid warrants that this results in fundmental unfairness or unduly harassing an accused. As we have already pointed out, it is no viola-

tion of the Federal Constitution to try a person a second time because the warrant or bill of indictment is defective, and, therefore, such a prosecution does not fall within the doctrine of Multiple Criminal Proceedings. The *Hoag Case*, (HOAG v. NEW JERSEY, 356 U. S. 464, 2 L. ed 2nd 912, 78 S. Ct. 829) arose out of facts in which a defendant was alleged to have robbed five individuals on a single occasion and who was acquitted in a State court on three indictments of robbery of three individuals but was subsequently prosecuted and convicted for the robbery of the fourth individual, and this Court affirmed the conviction of the defendant for the robbery of the fourth individual.

It is submitted, therefore, that all of these things must be raised in the courts below before this Court will give them consideration for this Court will only consider questions that have been adjudicated below. In WHITNEY v. CALIFORNIA, 274 U. S. 357, 47 S. Ct. 641, 71 L. ed. 1095, Mr. Justice Brandeis explained the reviewing power of this Court in his concurring opinion, as follows:

> "Our power of review in this case is limited not only to the question whether a right guaranteed by the Federal Constitution was denied (Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Montana ex rel. Haire v. Rice, 204 U. S. 291, 301, 51 L. ed. 490, 495, 27 Sup. Ct. Rep. 281), but to the particular claims duly made below, and denied (Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 485-488, 56 L. ed. 1171, 1175, 1176, 32 Sup. Ct. Rep. 790). We lack here the power occasionally exercised on review of judgments of lower federal courts to correct in criminal cases with errors, although the objection was not taken in the trial court. Wiborg v. United States, 163 U. S. 632, 658-660, 41 L. ed. 289, 298, 299, 16 Sup. Ct. Rep. 1127, 1197; Clyatt v. United States, 197 U. S. 207, 221, 222, 49 L. ed. 726, 731, 732, 25 Sup. Ct. Rep. 429. This a a writ of error to a state court. Because we may not inquire into the errors now alleged, I concur in affirming the judgment of the state court."

In YAKUS v. UNITED STATES, 321 U. S. 414, 88 L. ed. 835, 64 S. Ct. 660, in speaking of the timely assertion of alleged constitutional rights, this Court said:

"No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. O'Neil v. Vermont, 144 U. S. 323, 331, 36 L. ed. 450, 455, 12 S. Ct. 693; Barbour v. Georgia, 249 U. S. 454, 460, 63 L. ed. 704, 707, 39 S. Ct. 316; Whitney v. California, 274 U. S. 357, 360, 362, 380, 71 L. ed. 1095, 1099, 1100, 1107, 47 S. Ct. 641. Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken. Seaboard Air Line R. Co. v. Watson, 287 U. S. 86, 77 L. ed. 180, 53 S. Ct. 32, 86 ALR 174. While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts, see Brandeis, J. concurring in Whitney v. California supra (274 U. S. 380, 71 L. ed. 1107, 47 S. Ct. 641), and it could hardly be maintained that it is beyond legislative power to make the rule inflexible in all cases. Compare Woolsey v. Best, 299 U. S. 1, 81 L. ed. 3, 57 S. Ct. 2, with Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717."

As to the competency or relevancy of evidence in State courts and the so-called closing of the mouths of witnesses by sustaining objections, it is submitted that objections to the competency or relevancy of evidence in a State court involve the application either of the general or local law of evidence and furnish no ground for review or interposition by this Court.

BUCHALTER v. NEW YORK, 319 U. S. 427, 87 L. ed. 1492;

ADAMSON v. CALIFORNIA, 332 U. S. 46, 67 S. Ct. Rep. 1672, 1679;

LIZENBA v. CALIFORNIA, 314 U. S. 219, 227, 86 L. ed. 166;

BARRINGTON v. MISSOURI, 205 U. S. 483, 51 L. ed. 890;

SHERMAN v. GRINNELL, 144 U. S. 198, 36 L. ed. 403;

BROOKS v. MISSOURI, 124 U. S. 394, 31 L. ed. 454.

Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. JOHN v. PAULLIN, 231 U. S. 583, 585. See also C. I. O. v. McADORY, 325 U. S. 472, 477; PARKER v. ILLINOIS, 333 U. S. 571; CENTRAL UNION TEL. CO. v. EDWARDSVILLE, 269 U. S. 190; CHESAPEAKE & OHIO R. CO. v. McDONALD, 214 U. S. 191; HARDING v. ILLINOIS, 196 U. S. 78.

We will not burden this brief with further discussion of this question but we do refer the Court to certain cases which sustain our position that the State Court must be given an opporunity to pass upon constitutional questions before this Court will charge it with any errors in regard to such matters.

See:

UNITED STATES v. SPECTOR, 343 U. S. 169, 72 S. Ct. 591, 96 L. ed. 863;

SPIES v. ILLINOIS, 123 U. S. 143, 8 S. Ct. 21, 31 L. ed. 80;

BROOKS v. MISSOURI, 124 U. S. 394, 8 S. Ct. 443, 31 L. ed. 454;

BALDWIN v. KANSAS, 129 U. S. 52, 9 S. Ct. 193, 32 L. ed. 640;

MORRISON v. WATSON, 154 U. S. 111, 14 S. Ct. 995, 38 L. ed. 927;

ERIE R. CO. v. PURDIE, 185 U. S. 148, 22 S. Ct. 605, 46 L. ed. 847;

LAYTON v. MISSOURI, 187 U. S. 356, 23 S. Ct. 137, 47 L. ed. 214;

LOUISVILLE & N. R. CO. v. WOODFORD, 234 U. S. 46, 34 S. Ct. 739, 58 L. ed. 1202;

WILSON v. COOK, 327 U. S. 474, 66 S. Ct. 663, 90 L. ed. 793;

WILLIAMS v. GEORGIA, 349 U. S. 375, 99 L. ed. 1161, 75 S. Ct. 814;

PARKER v. ILLINOIS, 333 U. S. 571, 92 L. ed. 886, 68 S. Ct. 708;

PENNSYLVANIA R. CO. v. ILLINOIS BRICK CO., 297 U. S. 447, 462, 463, 80 L. ed. 769, 56 S. Ct. 556;

BAILEY v. ANDERSON, 326 U. S. 203, 90 L. ed. 3, 66 S. Ct. 66.

D

Conclusion on question of Federal jurisdiction.

In concluding our argument on the question of Federal jurisdiction, we wish to point out that the Appellants contend that because they recited certain portions of the Opinion and the Findings of Fact entered in the Declaratory Judgment case in the Federal District Court, and further, because the Prosecutor for the State did not file any written denial of the Motion that these allegations must be considered as admitted as to the facts alleged therein. To support this the Appellants cite Sec. 1-159 of the General Statutes of North Carolina (BONHAM v. CRAIG, 80 N. C. 224, 227, and TOMKINS v. MISSOURI, 323 U. S. 485, 89 L. ed. 407, 65 S. Ct. 370).

The simple answer to these contentions is that Sec. 1-159 of the General Statutes pertains to pleadings in civil actions; the section is as follows:

"Sec. 1-159. *Allegations not denied, deeemed true.* — Every material allegation of the complaint not controverted by the answer, and every material allegation of new matter in the answer, constituting a counterclaim, not controverted by the reply is, for the purposes of the

> action, taken as true. But the allegation of new matters in the answer, not relating to a counterclaim, or of new matter in the reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case requires."

The case of BONHAM v. CRAIG, supra, simply holds that where an allegation in the complaint is not denied in the answer it is admitted and has the same effect as if found by the jury. This form of admission by default is a common and ordinary principle of law in force in nearly all jurisdictions. It does not apply to motions made during the progress of the trial in a criminal case. Of course, these motions can be put in writing if the movant desires to do so but it is not required and Appellants cannot cite this Court a single North Carolina statute dealing with criminal procedure that requires such motions to be in writing. The usual practice in criminal cases is for the motion and the grounds relied upon to support the same to be dictated to the court reporter where they are made a part of the case on appeal when written up by the reporter. These motions are addressed to the court for a ruling and relate to matters appearing on the face of the record, and, of course, the prosecutor may urge in oral argument any reason he deems proper against such motions.

The general rule in such matters is well stated in 60 C. J. S. (Motions) p. 12, Sec. 10:

> "In the absence of a statute or rules of court requiring it, a motion need not be reduced to writing, but may be made orally in open court; and a rule requiring motions to be made in writing and filed does not apply to motions of course made in the progress of the cause or to motions made in open court during the trial or disposition of a case called for trial."

It is elementary that a motion is not a pleading and especially is this true as to motions made during the progress of a trial and this proposition, of course, requires no citation of authority to support it.

The case of TOMKINS v. MISSOURI, supra, cannot aid the

Appellants. In this case this Court was considering the sufficency of the allegations of a petition for a writ of habeas corpus and of necessity this petition was a pleading. For the purpose of determining the adequacy of the petition this court said that the allegations would be deemed to be true and were sufficient to establish a *prima facie* case for the issuance of the writ. This is the same principle that obtains in North Carolina and is the equivalent of the rule that a demurrer to a pleading admits all the facts which are well pleaded and alleged. It does not apply to motions in criminal cases.

The Appellants cannot raise a Federal question for the first time in their jurisdictional statement (HIAWASSEE RIVER POWER CO. v. CAROLINA-TENNESSEE POWER CO., 252 U. S. 341, 344, 64 L. ed. 601, 40 S. Ct. 330; THOMAS v. IOWA, 209 U. S. 258, 52 L. ed. 782).

Aside from the question of noncompliance with local State practice, it is clear that the decision of the Supreme Court of North Carolina based upon the nonFederal ground is broad enough to sustain the State Court judgment and that this nonFederal ground is adequate and tenable (EUSTIS v. BOLLES, 150 U. S. 361, 370, 37 L. ed. 1011; BEREA COLLEGE v. KENTUCKY, 211 U. S. 53, 53 L. ed. 81; FOX FILM CORP. v. MULLER, 296 U. S. 207, 210, 80 L. ed. 158; HERB v. PITCAIRN, 324 U. S. 117, 125-126, 89 L. ed. 789). The prosecution in this case having been grounded entirely on the theory that the criminal trespass was an invasion of possession and the State having admitted all the way through that the Appellants could not be excluded from the golf course because of race or color, the trial court having instructed the jury to this effect, and the Supreme Court of North Carolina having recognized the nondiscriminatory rule established by the Federal courts, there was no question of racial discrimination involved, and the disposition of the question was solely on State grounds. The whole record, as well as the Opinion of the Supreme Court of North Carolina, shows that there was no evasion of the Federal question attempted to be raised and that no device was adopted to merely prevent a review of the decision upon a Federal question.

This record does not show that a rule of State procedure had been used unreasonably to avoid a decision relative to Federal rights, but, to the contrary, the citations in this brief on State practice show that the Supreme Court of North Carolina has followed rules of State practice in force for many decades.

The Appellants, even if they had properly set up their alleged constitutional rights, have chosen to frame the argument upon the theory that their Federal rights prevent application of the State statute and that this amounts to a denial of Appellants' Federal rights rather than any validation of the State statute, and, therefore, an appeal does not lie in this case (MERGENTHALER LINOTYPE CO. v. DAVIS, 251 U. S. 256, 259, 64 L. ed. 255, 40 S. Ct. 133).

As stated in WILSON v. COOK, 327 U. S. 474, 90 L. ed. 793:

> "For 'the mere objection to an exercise of authority under a statute whose validity is not attacked cannot be made the basis' of an appeal."

We further submit that if the appeal of the Appellants is treated as an application for certiorari the same rule would apply and that the rights, privileges or immunities relied upon by the Appellants must be set up in the State courts (BROOKS v. MISSOURI, 124 U. S. 394, 31 L. ed. 454; HARTFORD LIFE INSURANCE CO. v. JOHNSON, 249 U. S. 490, 63 L. ed. 722; KEOKUK & HAMILTON BRIDGE CO. v. ILLINOIS, 175 U. S. 626, 44 L. ed. 299; MUTUAL LIFE INSURANCE CO. OF NEW YORK v. McGREW, 188 U. S. 291, 47 L. ed. 480).

Sufficiency of the evidence to be presented to the jury presents no substantial Federal question (NOBLE v. MITCHELL 164, U. S. 367, 41 L. ed. 472; AMERICAN RY. EXPRESS CO. v. KENTUCKY, 273 U. S. 269, 71 L. ed. 639; BELL TEL. CO. v. PENNSYLVANIA PUBLIC UTILITY COMMISSION, 309 U. S. 30, 84 L. ed. 563).

Whether an indictment is sufficient under the Constitution

and Laws of the State is not a Federal question (BARRINGTON v. MISSOURI, 205 U. S. 483, 51 L. ed. 890; RE ROBERTSON, 156 U. S. 183, 39 L. ed. 389; BROOKS v. MISSOURI, 124 U. S. 394, 31 L. ed. 454).

Whether or not a question is properly presented to a State court for decision should be determined by applying State laws and rules of court.

BUENA VISTA COUNTY v. IOWA FALLS, ETC., R. R. COMPANY, 112 U. S. 177, 28 L. ed. 680;

TARRANCE v. FLORIDA, 188 U. S. 519, 47 L. ed. 572;

DELMAR JOCKEY CLUB v. MISSOURI EX REL. ATTORNEY GENERAL, 210 U. S. 324, 52 L. ed. 1080;

MARIA MATHESON v. THE BRANCH BANK OF THE STATE OF ALABAMA, 7 Howard 258, 12 L. ed. 692;

JOHN v. PAULLIN, 231 U. S. 583, 58 L. ed. 381.

The rights, privileges, or immunities must be set up in the State Courts.

BROOKS v. MISSOURI, 124 U. S. 394, 31 L. ed. 454;

HARTFORD LIFE INS. CO. v. JOHNSON, 249 U. S. 490, 63 L. ed. 722;

KEOKUK & HAMILTON BRIDGE CO. v. ILLINOIS, 175 U. S. 626, 44 L. ed. 299;

MUTUAL LIFE INS. CO. OF NEW YORK v. McGREW, 188 U. S. 291, 47 L. ed. 480.

II

APPELLANTS' CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY ANY ALLEGED MULTIPLE TRIALS NOR DOES ANY QUESTION OF FORMER JEOPARDY ARISE BECAUSE APPELLANTS WERE TWICE TRIED OR BECAUSE BILLS OF INDICTMENT

WERE PROCURED IN THE SUPERIOR COURT OF GENERAL JURISDICTION.

Appellants have complained so much about the fact that they have been tried twice on the State charge of Criminal Trespass that the Appellee will explain the actual facts relative to this point, and they are as follows:

(a) Appellants were first convicted upon warrants issued from the Greensboro Municipal-County Court, and these warrants charged the Appellants with trespassing upon the possession of the *Gillespie Park Golf Course*. In this first trial the State, upon motion of the prosecuting officer, amended the warrants so that they charged a trespass upon the premises of *Gillespie Park Golf Club, Inc.*.

(b) Upon conviction Appellants appealed to the Supreme Court of North Carolina, which held that the Court had no power to permit the amendment to be made to the warrant because it substituted one criminal charge for another or charged an entirely different crime from the one on which the defendants were convicted in the lower court (STATE v. COOKE, 246 N. C. 518, 521; 98 S. E. 2d 885). The judgment was arrested, as will be seen from the Opinion of the Supreme Court of North Carolina, and the Judge writing the Opinion on this appeal stated that the Appellants "may be tried on bills found in the Superior Court for the crime attempted to be charged by the amendment", and the same Justice also stated that the Appellants could be tried under the original warrant. The concurring opinion of Mr. Justice Parker stated:

> "It seems plain that a verdict of conviction or acquittal on the warrants in this case as drawn would not be a bar to the new warrants in the form to which they were changed by the amendments."

(c) The Court will bear in mind that this arrest of judgment in the first trial came about upon an appeal pursued by the Appellants. The prosecuting officer of the Guilford Superior Court procured bills of indictment, which appear at R-36 through 42. At that time the prosecutor was not

aware that under the provisions of Chapter 971 of the Session Laws of 1955 of North Carolina the Greensboro Municipal-County Court of Guilford County had original and exclusive jurisdiction over the offense charged in the warrants. Ordinarily this would not have made any difference because by statute the Superior Courts of the State, which are Courts of general jurisdiction, have concurrent jurisdiction of criminal offenses with these inferior courts. However, this was not true of Guilford County, since the statute on concurrent jurisdiction had excepted Guilford County. The statute, Sec. 7-64 of the General Statutes of North Carolina, reads as follows:

> "Sec. 7-64. *Concurrent Jurisdiction.*—In all cases in which by statute original jurisdiction of criminal actions has been, or may hereafter be, taken from the superior court and vested exclusively in courts of inferior jurisdiction, such exclusive jurisdiction is hereby divested, and jurisdiction of such actions shall be concurrent and exercised by the court first taking cognizance thereof. The provisions of this section shall remain in full force and effect, unless expressly repealed by some subsequent act of the General Assembly, and shall not be repealed by implication or by general repealing clauses in any act of the General Assembly conferring exclusive jurisdiction on inferior courts in misdemeanor cases which may be hereafter enacted. Appeal shall be, as heretofore, to the superior court from all judgments of such inferior courts: Provided, that this section shall not apply to the counties of Alleghany, Cabarrus, Caswell, Cherokee, Clay, Craven, Currituck, Dare, Davidson, Edgecombe, Gaston, Gates, Graham, Granville, *Guilford*, Harnett, Henderson, Hertford, Hyde, Iredell, Jones, Lenoir, New Hanover, Pamlico, Perquimans, Rockingham, Rutherford, Scotland, Surry, Union and Warren." (Emphasis ours)

(d) When the prosecutor realized this new warrants were issued in the Greensboro Municipal-County Court (R-2—25) and the Appellants were tried in that Court and upon conviction appealed to the Superior Court of Guilford County. The prosecutor in the Superior Court of Guilford County tried the Appellants on the warrants, which is according to State practice in such cases, and entered a nol-pros as to bills

of indictment. This indicated that the prosecutor did not wish to prosecute on the bills, and for that matter the bills of indictment were void. However, Appellants would be protected if any attempt was made to try them on the bills of indictment because jeopardy for identical offenses is prohibited by the State Constitution (STATE v. WATSON, 209 N. C. 229, 183 S. E. 286). Mr. Justice Rodman, who wrote the Opinion of the Supreme Court of North Carolina, explains all this when in the Opinion he wrote as follows:

> "In closing the opinion in the previous appeal, the writer, author of the opinion, said: 'Defendants may, of course, now be tried under the original warrant since the court was without authority to allow the amendment changing the crime charged; or they may be tried on bills found in the Superior Court for the crime attempted to be charged by the amendment.'
>
> "The last clause of that opinion is also relied on in the motion to quash. The statement, accurate as to most of the counties of the State, is inaccurate with respect to Guilford and the other counties enumerated in the proviso to G. S. 7-64. The Legislature, in the exercise of its discretion, has denied to the Superior Court sitting in the counties named in the proviso to G. S. 7-64 the right to exercise concurrent jurisdiction with inferior courts in the trial of misdemeanors. Because of the limitations so imposed on the jurisdiction of the Superior Court of Guilford County, it could not exercise original jurisdiction of the crime charged, namely, trespass after being forbidden, and if defendants were to be prosecuted for the trespass presently charged, the prosecution had to originate in a court inferior to the Superior Court. This is made clear in the concurring opinion of Justice Parker, who said: 'It seems plain that a verdict of conviction or acquittal on the warrants in this case as drawn would not be a bar to the new warrants in the form to which they were changed by the amendments.'"

The Appellants in their Motion to Quash (R-32, 35) allege that this constitutes "double jeopardy of their liberty in violation of the Fifth Amendment to the Constitution of the United States as incorporated into the Fourteenth Amendment to the Constitution *****". Appellants in their brief for the first time contend that this constitutes multiple or

successive trials for multiple offenses which is contrary to the Fourteenth Amendment because of fundamental unfairness or unduly harassing an accused. This contention was never presented to the trial court or the Supreme Court of North Carolina and represents "smuggling additional questions into a case" after this Court ordered the case heard (IRVINE v. CALIFORNIA, 347 U. S. 128, 129, 98 L. ed. 561, 74 S. Ct. 381). However, as we have shown on the question of jurisdiction, the quashing of a bill of indictment which is bad does not constitute any former jeopardy and by the same token it would not constitute harassment by multiple offenses as contended for by Appellants. This seems to be taken for granted by Mr. Justice Holmes in UNITED STATES v. OPPENHEIMER, 242 U. S. 85, 61 L. ed. 161, 37 S. Ct. 68, where he said, after holding that the bar of the Statute of Limitations could not be litigated on a second indictment:

> "Of course, the quashing of a bad indictment is no bar to a prosecution on a good one ****".

The case of HOAG v. NEW JERSEY, 356 U. S. 464, 2 L. ed. 2d 913, 78 S. Ct. 829, does not help the Appellants in the least. Hoag robbed five individuals on a single occasion and was acquitted in a State court prosecution on three indictments charging robbery of three of the individuals. Hoag was subsequently prosecuted and convicted on an indictment charging robbery of the fourth individual, and this conviction was upheld by this Court as not violating any provision of the Federal Constitution, and as not constituting former jeopardy prohibited by the Fifth Amendment or the Fourteenth Amendment. There is, of course, no denial of due process where one has appealed from a conviction of crime in a State court and has had the conviction set aside and has been retried for the same offense (MURPHY v. MASSACHUSETTS, 177 U. S. 155, 44 L. ed. 711, 20 S. Ct. 639; FRANK v. MANGUM, 237 U. S. 309, 59 L. ed. 969, 35 S. Ct. 582; LOUISIANA EX REL. FRANCIS v. RESWEBER, 329 U. S. 459, 91 L. ed. 422, 67 S. Ct. 374; HILL v. TEXAS, 316 U. S. 400, 86 L. ed. 1559, 62 S. Ct. 1159—compare PALCO v. CONNECTICUT, 302 U. S. 319, 82 L. ed. 288,

58 S. Ct. 149; BROCK v. NORTH CAROLINA, 344 U. S. 424, 97 L. ed. 456, 73 S. Ct. 349).

The Constitution of the United States does not protect an individual against "double jeopardy" or successive prosecutions for the same offense in a State Court. The Fifth Amendment, which provides that no person shall for the same offense be twice put in jeopardy of life or limb, is a limitation upon action by the Federal Government and does not apply to action by States.

BARRON v. BALTIMORE, 7 Pet. 243;

UNITED STATES v. LANZA, 260 U. S. 377, 67 L. ed. 314;

BRANTLEY v. GEORGIA, 217 U. S. 284, 54 L. ed. 768;

PHILLIPS v. McCAULEY, 92 Fed. (2d) 790 (C. C. A. 9);

FOX v. OHIO, 5 How. 434, 12 L. ed. 410, 434.

This Record thus presents no question for decision under the Fifth Amendment.

The Fourteenth Amendment ("due process" and "privileges and immunities") does not guarantee to an individual the right not to be twice placed in jeopardy for the same offense.

Compare:

U. S. v. RAGEN, (1950; C. C. A. 7) 181 Fed. (2d) 1001;

AMRINE v. TINES, (1942; C. C. A. 10), 131 Fed. (2d) 827;

PALKO v. CONNECTICUT, 302 U. S. 319, 82 L. ed. 288;

MAXWELL v. DOW, 176 U. S. 581, 44 L. ed. 597;

In U. S. v. RAGEN, supra, it is said, at p. 1003:

"The only right under the Federal Constitution of which the petitioner in the case at bar claims to be deprived is his right to be protected from double jeopardy. The sole specific reference in the United States Constitution to what is usually referred to as 'double jeopardy' is in the Fifth Amendment: '***.' But the Fifth Amendment is not directed to the States and applies only to offenses against, and trials under, the laws of the United States, Palko v. State of Connecticut, 302 U. S. 319, 58 S. Ct. 149, 82 L. ed. 288; Phillips v. McCauley, 9 Cir., 92 F. 2d 790.

****

"The Supreme Court has considered the question whether the right granted in the Fifth Amendment to be not twice placed in jeopardy for the same offense is within the scope of the due process clause of the Fourteenth Amendment. In Palko v. State of Connecticut, 302 U. S. 319, 323, 58 S. Ct. 149, 151, 82 L. ed. 288, the court stated: 'We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments 1 to 8) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.'

"The court then held that the claimed double jeopardy there being considered was not a violation of the due process clause."

In AMRINE v. TINES, supra, it is said, at p. 833:

"And, unlike the fundamental right to assistance of counsel granted by the Sixth Amendment to the Constitution, the right not to be twice placed in jeopardy for the same offense granted by the Fifth Amendment, is not generally regarded as a member of that family of fundamental rights coming within the scope and protection of the due process and privileges and immunities clause of the Fourteenth Amendment, and from which it derived Federal power to correct state process."

Since the guarantee of due process afforded by the Fourteenth Amendment does not protect an individual against successive prosecutions for the same crime in a State Court,

the Appellants' plea of former jeopardy could only have raised questions concerning rights guaranteed him by the State Constitution. In affirming the conviction and sentence of imprisonment, the Supreme Court of North Carolina necessarily determined that the Appellant was not twice placed in jeopardy for the same offense in contravention of the North Carolina Constitution.

III

THE FEDERAL CONSTITUTION DOES NOT COMPEL THE STATE TO EXTEND TO THE APPELLANTS THE DOCTRINE OF ESTOPPEL OR COLLATERAL ESTOPPEL AND IRRESPECTIVE OF ANY CONSTITUTIONAL REQUIREMENTS THESE FORMS OF ESTOPPEL ARE NOT APPLICABLE IN THIS CASE.

The Appellee has pointed out in previous argument above that this Court has expressed grave doubts as to whether collateral estoppel can be regarded as a constitutional requirement (HOAG v. NEW JERSEY, supra). While the Appellants relied on this proposition in the court below referring to estoppel in their Motion to Quash, they did not emphasize the point in their brief before this Court, and it would seem that they prefer to pin their hopes on the principle of judicial notice. The doctrine of collateral estoppel is explained in the case of HOAG v. NEW JERSEY, supra, and citations of cases in which it has been applied and rejected, and in this connection this Court said:

> "Petitioner further contends that his conviction was constitutionally barred by 'collateral estoppel.' His position is that because the sole disputed issue in the earlier trial related to his identification as a participant in the Gay's Tavern robberies, the verdict of acquittal there must necessarily be taken as having resolved that issue in his favor. The doctrine of collateral estoppel, so the argument runs, is grounded in considerations of basic fairness to litigants, and thus for a State to decline to apply the rule in favor of a criminal defendant deprives him of due process. Accordingly, it is claimed that New Jersey could not relitigate the issue of petitioner's identity,' and is thus precluded from convicting him of robbing Yager.

"A common statement of the rule of collateral estoppel is that 'where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action.' Restatement, Judgments, Sec. 68(1). As an aspect of the broader doctrine of res judicata, collateral estoppel is designed to eliminate the expense, vexation, waste, and possible inconsistent results of duplicatory litigation. See Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818, 820. Although the rule was originally developed in connection with civil litigation, it has been widely employed in criminal cases in both state and federal courts. See, e.g., Harris v. State, 193 Ga. 109, 17 S. E. 2d 573; Commonwealth v. Evans, 101 Mass. 25; United States v. Oppenheimer, 242 U. S. 85, 61 L. ed. 161, 37 S. Ct. 68, 3 ALR 516; Sealfon v. United States, 332 U. S. 575, 92 L. ed. 180, 68 S. Ct. 237; cf. Yates v. United States, 354 U. S. 298, 335, 1 L. ed. 2d 1356, 1384, 77 S. Ct. 1064.

"Despite its wide employment, we entertain grave doubts whether collateral estoppel can be regarded as a constitutional rquirement. Certainly this Court has never so held. However, we need not decide that question, for in this case New Jersey both recognized the rule of collateral estoppel and considered its applicability to the facts of this case."

An examination of the cases in this Court will show that wherever it has been contended that the doctrine is applicable it has always been between the same parties, and the cases represent situations where both cases were tried in the Federal Courts and not situations where one case is tried in the Federal Court and the other tried in the State Court. In addition to the cases cited in HOAG v. NEW JERSEY, supra, the cases cited below represent some examples:

CROMWELL v. COUNTY OF SAC, 94 U. S. 51, 24 L. ed. 681;

SOU. PAC. R. R. CO. v. UNITED STATES, 168 U. S. 1, 48, 42 L. ed. 355;

BANKERS COAL CO. v. BURNET, 287 U. S. 308, 77 L. ed. 325;

TAIT v. WESTERN MD. RY. CO., 289 U. S. 620, 623, 77 L. ed. 1405.

There are also several cases in the various District Courts and Circuit Courts of Appeal, as follows:

THE EVERGREENS v. NUNAN, 141 F. 2d 927, 928;

ENGINEERS CLUB OF PHILADELPHIA v. UNITED STATES, 42 F. Supp. 182, 187;

UNITED STATES v. SILLIMAN, 167 F. 2d 607, 612;

BUROMIN CO. v. NATIONAL ALUMINATE CORP., 70 F. Supp. 214, 218;

UNITED STATES v. BOWER, 95 F. Supp. 19, 21;

HEDDEN v. UNITED STATES, 105 F. Supp. 1010, 1017;

CHARLES E. HARDING CO. v. HARDING, 88 A. L. R. 563, Annotation p. 574.

The Appellants are asking that the findings of fact and judgment of the Federal District Court in a civil action for declaratory judgment and injunction be accepted by the State Court as decisive of the prosecution and be made the equivalent of a verdict of Not Guilty. We do not believe this is proper and that the determinations in a civil action in the Federal Court can prevent the State from proceeding with a criminal prosecution. In the first place, the State was not a party to the civil action. The City of Greensboro, the Greensboro City Board of Education and the Gillespie Park Golf Club, Inc. were all created under the Constitution and Laws of the State of North Carolina with limited powers and duties, and these bodies or entities are not authorized to "stand in judgment for the State." (GUNTER v. ATLANTIC COAST LINE R. CO., 200 U. S. 285-287, 50 L. ed. 484, 485, 26 S. Ct. 252; FORD MOTOR CO. v. TREASURY DEPARTMENT OF INDIANA, 323 U. S. 459, 89 L. ed. 389, 65 S. Ct. 347). The prosecuting officer of the State in this case is a constitutional officer (Constitution of North Carolina,

Article IV, Sec. 23) and he was not made a party to the action. It is not believed that private parties or citizens can secure a judgment in the Federal Court which will prevent the State in the exercise of its constitutional powers and its police powers from prosecuting its criminal actions.

Certainly the reverse is not true in the application of estoppel for in the case of HELVERING v. MITCHELL, 303 U. S. 391, 82 L. ed. 917, 58 S. Ct. 630, Mr. Justice Brandeis thought that this could not be done, writing for this Court he said:

> "The difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of res judicata. The acquittal was 'merely . . . an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.' Lewis v. Frick, 233 U. S. 291, 302, 58 L. ed. 967, 973, 34 S. Ct. 488. It did not determine that Mitchell had not wilfully attempted to evade the tax. That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled."

It would seem that an estoppel of any nature cannot flow from a criminal action to a civil action, then by the same token it cannot flow from the civil action to the criminal action.

The City of Greensboro is a municipal corporation with limited powers, and the Appellants have not shown, nor can they show, that the City of Greensboro is authorized to stand for the State in judgment in a civil action in the Federal Court. The same is true of the Greensboro City Board of Education, it being a governmental unit with limited powers for educational purposes, and it follows without argument that the incorporated Golf Club cannot perform this function.

The State of North Carolina cannot be sued except in cases where it gives consent for such action (DALTON v. STATE HIGHWAY COMMISSION, 223 N. C. 406, 27 S. E. 2d 1; CARPENTER v. ATLANTA, ETC. R. CO., 184 N. C.

400, 114 S. E. 693; DREDGING CO. v. STATE, 191 N. C. 243, 131 S. E. 665).

As pointed out, the burden of proof in the civil action is different from the burden of proof in the criminal action in the State Court. No authorized agency representing the State was made a party in the civil action, and, furthermore, the application of the doctrine, at least as shown by the cases examined, has been limited to cases decided by the courts of one sovereign. No cases have been found in which the doctrine had been applied in two cases arising and determined in different sovereigns. While it is true that State officers can be sued and controlled by suits in the Federal Court for violation of constitutional rights upon the theory that such officers as individuals have acted unlawfully under color of State statute, however, this does not mean that a State can be controlled by the courts in the performance of its political duties through suits against its officials. In this connection the statement of this Court in the case of GREAT NORTHERN LIFE INSURANCE CO. v. READ, 322 U. S. 47, 88 L. ed. 1121, 64 S. Ct. 873, is in point; this Court said:

> "This ruling that a state could not be controlled by courts in the performance of its political duties through suits against its officials has been consistently followed. Chandler v. Dix, 194 U. S. 590, 48 L. ed. 590, 24 S. Ct. 766; Fitts v. McGhee, 172 U. S. 516, 529, 43 L. ed. 535, 541, 19 S. Ct. 269; Murray v. Wilson Distilling Co. 213 U. S. 151, 167, 53 L. ed. 742, 750, 29 S. Ct. 458; Lankford v. Platte Iron Works Co. 235 U. S. 461, 468, et seq., 59 L. ed. 316, 318, 35 S. Ct. 173; Re New York, 256 U. S. 490, 500, 65 L. ed. 1057, 1062, 41 S. Ct. 588; Worchester County Trust Co. v. Riley, 302 U. S. 292, 296, 299, 82 L. ed. 268, 273, 275, 58 S. Ct. 185. Efforts to force, through suits against officials, performance of promises by a state collide directly with the necessity that a sovereign must be free from judicial compulsion in the carrying out of its policies within the limits of the Constitution. Monaco v. Mississippi, 292 U. S. 313, 320, 78 L. ed. 1282, 1284, 54 S. Ct. 745; Louisiana v. Jumel, 107 U. S. 711, 720, 27 L. ed. 448, 451, 2 S. Ct. 128. A state's freedom from litigation was established as a constitutional right through the Eleventh Amendment. The inherent nature of sovereignty prevents actions against a state by its own citizens without its consent. Hans v.

Louisiana, 134 U. S. 1, 10, 16, 33 L. ed 842, 845, 847, 10 S. Ct. 504."

In the case of YATES v. UNITED STATES, 354 U. S. 298, 1 L. ed 2d 1356, 77 S. Ct. 1064, it was said that the doctrine of collateral estoppel is not made inapplicable by the fact that this is a criminal case whereas the prior proceedings were civil in character. It should be noted, however, that the prior proceeding, although civil in character, was of a penal nature, and it was said that the standards of proof in the civil proceeding were no greater than those applicable in the criminal proceeding. This is also explained in the Opinion of the District Judge in UNITED STATES v. BOWER, 95 F. Supp. 19, 21.

Complex questions also arise as to what facts can be used for estoppel purposes. Judge Learned Hand thought that there was some question as to the use of what he called "mediate data" which was decided in the first suit for the purpose of establishing ultimate facts in the second suit.

The attitude of the lower Federal Courts will be found in the following cases:

UNITED STATES v. KAADT, 171 F. 2d 600;

UNITED STATES v. COWART, 118 F. Supp. 903;

UNITED STATES v. PERRONE, 161 F. Supp. 252;

THE EVERGREENS v. NUNAN, 141 F. 2d 927;

WILLIAMS v. UNITED STATES, 179 F. 2d 644, 649.

Even if the Appellants had properly introduced the findings of fact and judgment of the civil action in the Federal Court into evidence in the criminal action in the State Court as they were required to do (FRIEDMAN v. MARYLAND CASUALTY CO., 228 Mo. Appeal Rep. 680, 71 S. W. 2d 491; PEOPLE v. RODGERS, 171 N. Y. S. 451) any estoppel or collateral estoppel would not be applicable, and the Supreme Court of North Carolina did not have to extend the doctrine to the Appellants under this situation.

Certainly if an acquittal in the Federal Court in a criminal action cannot prevent a State from prosecuting a defendant in a State Court for the same crime (BARTKUS v. ILLINOIS, ——— U. S. ———, 3 L. ed 2d 684; 79 S. Ct. ———), then by the sheer force of logic it is hard to see how a determination in a civil action in the Federal Court can prevent a criminal prosecution in the State Court even though it may involve some of the facts adjudicated in the Federal Court.

IV

THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION HAS NO APPLICATION IN THIS CASE.

The Supreme Court of North Carolina recognizes that the decisions of this Court are final in the interpretation of the Constitution of the United States; that its decisions are the law of the land and are authoritative in the State (CONSTANTIAN v. ANSON COUNTY, 244 N. C. 221, 229, 93 S. E. 2d 163). The Supreme Court of North Carolina further recognized in its Opinion in this case that citizens of the State could not be excluded from the golf course because of race or color and cited Federal cases to support this principle. The Supremacy Clause, therefore, has been recognized and followed where it is applicable. This does not mean that the Supreme Court of North Carolina must recognize the findings of fact and the judgment of the Federal District Court, and we do not believe that the application of the Supremacy Clause requires the State to extend the recognition demanded by the Appellants in this case.

V

THERE IS NO EVIDENCE THAT THE APPELLANTS HAVE BEEN DEPRIVED OF ANY RIGHTS OR PRIVILEGES GUARANTEED BY THE FOURTEENTH AMENDMENT.

The Appellants seem to be under the impression at all

times during this case that because they were colored citizens they were entitled to play on the golf course whether they were members of the Golf Club or not and irrespective of any conditions or rules as to eligibility or membership applying to all persons regardless of race or color. The evidence shows that the Appellants came to the golf course and said that they wanted to play golf (R-44). They were told that it was a private Club for members and invited guests, and five of them put seventy-five cents (75c) each on the counter and went out on the grounds and began to play golf after being told that they could not play.

The Appellants utterly disregarded all membership requirements applicable to all citizens, and which, as far as we know, are applicable in all golf clubs everywhere.

The evidence of membership and the requirements applicable to all persons in order to have the privileges of the golf course are as follows:

(R-46) "We had membership for the golf club, Inc., and the dues for membership was $50.00 a year plus $10.00 Federal tax, which totaled $60.00. It was my duty to collect those fees. We had some other type of membership besides the annual fee of $60.00. Associate membership for a person who desired to play would have to pay additional greens fees as he played. All of the students would be eligible to play on the golf course plus their guest. ****

" **** We had a locker room which was provided for the members, and the members would pay a yearly fee for the lockers. We did not maintain lockers for any other persons other than the members. ****"

(R-48) "I am not familiar with the legal end of the Bylaws of the Gillespie Park Golf Club, Inc., but I believe I do know who is entitled to play on this Golf Course under the Bylaws of the Club. Members of Gillespie Park Golf Club, (fol. 45) members of the Carolina Golf Association, members of a club that belongs to the Carolina Golf Association

and the students and guests of me as an instructor. The way I interpret the bylaws, members who are allowed to play other than the members of the corporation are members of the Carolina Golf Association, as a separate class. That is my interpretation of the bylaws. ****"

(R-54—Appellant George Simkins, Jr.) "**** I have never filed for membership in the Gillespie Park Golf Club, Inc. I was not invited by any members of the club to play on this occasion. I was not invited by either of the two golf professionals there. ****"

(R-72) "By-Laws of the Gillespie Park Golf Club, Inc.

"ARTICLE I.

"Section 1—Membership.

"Membership in this corporation shall be restricted to members who are approved by the Board of Directors for membership in this Club. There shall be two types of membership; one, the payment of a stipulated fee of $30.00 or more, plus tax, shall cover membership and greens fees. The other type of membership shall be $1.00, plus tax, but this type of member shall pay greens fees each time he uses the course. The greens fees and the amount of membership fees may be changed by the Board of Directors at any time upon two-thirds vote of the members of the Board.

"Section 2—Use of Golf Facilities.

"The golf course and its facilities shall be used only by (fol. 71) members, their invited guests, members in good standing of other golf clubs, members of the Carolina Golf Association, pupils of the Professional and his invited guests. ****"

(R-77) "Q. Was the Nocho Park Golf Club, Inc. a member of the Carolina Golf Association on that date?

"Mr. Marsh: Objection.

"Court: Overruled.

"A. No, sir, it was not.

"There was no reciprocal agreement between the Gillespie Park Golf Club and Nocho Park Golf Club with reference to playing on the course. Our reciprocation was with other clubs that were members of the Carolina Golf Association.

"Q. Did any of these defendants on the 7th day of De- (fol. 76) cember, 1955, or any date prior thereto file with the Gillespie Park Golf Association an application for membership?

"Mr. Marsh: Objection.

"Court: Overruled.

"A. No, sir, they did not to my knowledge. ****"

The Trial Court specifically instructed the jury that Appellants could not be excluded from the golf course because of race. He instructed the jury as follows:

"Now, as to that question which arises upon the evidence, I instruct you then, ladies and gentlemen of the jury, that under the law as determined by the United States Court and as pronounced by them, the Gillespie Golf Club, Inc., by leasing the land from the City of Greensboro to use as a golf course was subjected to the same obligations as the City of Greensboro would have been had it operated a golf course itself. It was subjected to the same rights as the City would have had, the same obligations and same responsibilities; that is to say, the law would not permit the City and, therefore, would not permit its lessee, the Gillespie Park Golf Club, Inc., to discriminate against any citizen of Greensboro in the maintenance and operation and use of a golf course. It could not exclude either defendant because of his race or for any other reason applicable to them alone; that is to say, they were entitled to the same rights to use the golf course as any other citizen of Greensboro would be provid-

ed they complied with the reasonable rules and regulations for the operation and maintenance and use of the golf course. They would not be required to comply with any unreasonable rules and regulations for the operation and maintenance and use of the golf course. ****

"If the corporation organized and known as the Gillespie Park Golf Club, Inc., if it maintained property and operated and used it for a golf course belonging to the City of Greensboro and if the defendant was a resident of the City of Greensboro, then he had the same right to become a member of the golf club as any other resident of Greensboro, if he was a member of another golf club which had a reciprocal agreement with the Gillespie Park Golf Club to permit members on one course or members of one club playing on the other course, then such defendant and each of them had the same right or had the right to play upon that Gillespie Park Course. If the defendants, or either of them, were guests of some members of the Gillespie Park Golf Club, then they had a right to play upon that course.

"In other words, ladies and gentlemen of the jury, they had the same right under the laws as interpreted by the United States Courts to play on the golf course as any other citizen of the City of Greensboro provided they complied with the reasonable rules and regulations designed for the orderly maintenance and use of the golf course by the citizens of Greensboro. ****

"Furthermore, I instruct you that your verdict will not be prompted in any manner whatsoever by the race of the (fol. 91) defendants. That has absolutely nothing to do with the case in law and should not be considered by you. Under the law, all citizens have equal rights and equal responsibilities in the maintenance and use of public facilities, that is facilities maintained by the governmental unit in which they live, and therefore the fact that the defendants are Negroes certainly may not be considered to their prejudice nor to the prejudice of the State. In other words, ladies and gentlemen, you will consider the evidence as you recall and understand it to be with the law as I have attempted to in-

strued you the law to be, and arrive at a verdict which is fair, which is just and which speaks the truth. ****"

The trial judge recognized that color had nothing to do with the right of Appellants to play on the golf course and so told the jury, and the Supreme Court of North Carolina recognized that fact and further stated that it (the Supreme Court of North Carolina) did not question the soundness of the legal principles set forth in DAWSON v. MAYOR AND CITY COUNCIL OF BALTIMORE CITY, 220 F. 2d 386; LAWRENCE v. HANCOCK, 76 F. Supp. 1004; TATE v. DEPARTMENT OF CONSERVATION AND DEVELOPMENT, 133 F. Supp. 53; CULVER v. CITY OF WARREN, 83 N. E. 2d 82; HOLMES v. CITY OF ATLANTA, 350 U. S. 879, 76 S. Ct. 141, 100 L. ed. 876; BALTIMORE CITY v. DAWSON, 350 U. S. 877, 100 L. ed. 774, 76 S. Ct. 133, 220 F. 2d 386; DERRINGTON v. PLUMMER, CCA 5, 240 F. 2d 922; NEW ORLEANS CITY PARK IMPROVEMENT ASSO. v. DETREGE, 252 F. 2d 122, CCA 5; WARD v. CITY OF MIAMI, CCA 5, 252 F. 2d 787.

We do not understand that the Appellants have superior privileges because of their color but we do understand that they cannot be discriminated against because of their color. Appellants are subject to the same eligibility conditions as any other race. This point was expressly decided in FRASIER v. BOARD OF TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA, 134 F. Supp. 589, where a 3-Judge District Court decided that eligible Negroes could not be prohibited from attending the University of North Carolina because of their color. The Court was careful to say, however, that the Board of Trustees of the University had the power to decide as to whether or not applicants for admission were eligible, the Court saying:

> "But we decide only that the Negroes as a class may not be excluded because of their race or color; AND THE BOARD RETAINS THE POWER TO DECIDE WHETHER APPLICANTS POSSESS THE NECESSARY QUALIFICATIONS. This applies to the plaintiffs in the pending case, as well as to all Negroes who subsequently apply for admission (Emphasis ours)."

There being no reciprocal agreement between the Gillespie Park Golf Club and Nocho Park Golf Club with reference to playing on the golf course (State Record, p. 75) the Appellants were simply not eligible to play on the golf course, and it was not a question of color.

The Appellants were treated in the same manner in which any white person would have been treated, or any group of white persons, who came to the golf course, threw down 75c on the Club House counter, walked out on the course and commenced playing golf. Their exclusion from the golf course and the refusal to recognize their right to play golf under these conditions is no violation of the Fourteenth Amendment.

VI

THE SUPREME COURT OF NORTH CAROLINA WAS NOT REQUIRED TO TAKE JUDICIAL NOTICE OF THE EVIDENCE, FACTS, FINDINGS OF FACT AND JUDGMENT ENTERED BY THE FEDERAL DISTRICT COURT IN THE CIVIL ACTION.

On R-71 appears all of the evidence that was ever given in the criminal action now before the Court on the part of Myrtle D. Cobb, Deputy Clerk of the Federal Court in Greensboro, which is as follows:

> "My name is Myrtle D. Cobb and I am Deputy Clerk in the Federal Court in Greensboro, and I have in my possession or it is my duty to keep in my possession public records concerning Federal cases and I do have in my possession the record in the case of SIMKINS, et al. v. THE GILLESPIE PARK GOLF COURSE. I have all of the original papers in that case."

Immediately following this evidence (R-71) the question arose as to whether Mr. Hughes, President of Gillespie Golf Club, Inc., could be called by the defendants as an adverse witness. The only thing that again appears is on R-79 where we have the following:

"Mrs. Kennedy: If your Honor please, we'd like, if possible, to have a ruling on whether or not these would be admissible.

"Court: I am going to sustain the objection as to those two Exhibits, that is No. 6 and No. 7.

"Exception No. 22)."

Now, the Supreme Court of North Carolina did not know what "these" meant, and the State Court never did know what was contained in Exhibits 6 and 7 because they were never sent up as a part of the Record or Case on Appeal, and in North Carolina when the defendant appeals the defendant makes out the case on appeal and presents it to the prosecuting officer for agreement or exceptions. On R-105 the Court will see that Appellants tendered their case on appeal and that the prosecuting officer accepted service of same, and on R-106 the Court will see that the parties, that is, the Appellants and the prosecuting officer, stipulated that what the Appellants had tendered as the case on appeal would "constitute the case on appeal to the Supreme Court in this cause."

It is interesting to note (R-119) that the Appellants filed a motion suggesting diminution of the record but the Court will see that this motion pertains to records of the Municipal-County Court and not to any of the records pertaining to the facts and judgment of the Federal District Court in the civil action. On R-128 the Court will see that the Appellants filed a motion in the Supreme Court of North Carolina pertaining to Judicial Notice in which they recite certain portions of the opinion in the civil action in the Federal District Court (SIMKINS v. CITY OF GREENSBORO, 149 F. Supp. 562) and it is interesting to note that in the last paragraph in quotations on R-130 the Court recites that the decree has not yet been entered.

The Appellants now say that the Supreme Court of North Carolina should take judicial notice of the evidence, facts, findings of fact and judgment in the Federal District Court and thereby create an estoppel which is decisive of the case.

To support this they cite BROWN v. BOARD OF EDUCATION, 344 U. S. 1, 3, 97 L. ed. 3, 4, 73 S. Ct. 1; WELLS v. UNITED STATES, 318 U. S. 257, 260, 87 L. ed. 746, 748, 63 S. Ct. 582; and UNITED STATES v. JOHN J. FELIN & CO., 334 U. S. 624, 640, 92 L. ed. 1614, 1626, 68 S. Ct. 1238. An examination of these cases will show that they all originated in the Federal Courts, and, of course, the power of the Supreme Court of the United States to take judicial notice of decisions and proceedings in cases in the Federal Courts is one thing while the power of the Supreme Court of the United States to take judicial notice of proceedings in other cases upon a case coming from a State Supreme Court is another thing. For example: This Court does not take judicial notice of the decisions of the courts of one State in a case coming to it from the courts of another State (EASTERN BLDG. & L. CO. v. WILLIAMSON, 189 U. S. 122, 47 L. ed. 735, 23 S. Ct. 527. As we pointed out above, Mr. Justice Brandeis in his concurring opinion in WHITNEY v. CALIFORNIA, supra, said that the power of this Court was limited to the review of Federal questions as to a right guaranteed by the Federal Constitution and to particular claims duly made below and denied, and, further, that this Court lacked the power on review of a State case which was exercised on review of lower Federal courts to correct vital errors although objection was not made.

An affidavit or a verified motion is not sufficient to support a charge of discrimination and the filing of such affidavit or motion does not dispense with proof (TARRANCE v. FLORIDA, 188 U. S. 519, 47 L. ed. 572, 23 S. Ct. 402, affg. 43 Fla. 446, 30 So. 685; MARTIN v. TEXAS, 200 U. S. 316, 50 L. ed. 497, 26 S. Ct. 338).

The burden is on the Appellants to show discrimination based on race or color as to persons playing on the golf course (AIKENS v. TEXAS, 325 U. S. 398, 89 L. ed. 1692, 65 S. Ct. 1276; MURRAY v. LOUISIANA, 163 U. S. 101, 41 L. ed. 87; FAY v. NEW YORK, 332 U. S. 261, 91 L. ed. 2043).

The Supreme Court of North Carolina in its opinion in this case (STATE v. COOKE, et al., 248 N. C. 485, 103 S. E.

2d 846) cited many cases showing that one court is not bound to take notice of the judgment in another court judicially. See R-116 where, among the cases cited to support this point, is SCHULER v. ISRAEL, 120 U. S. 506, 30 L. ed. 707, and this Court said that one court did not have to take judicial notice of the judgment of another court and the North Carolina Court also cited UNITED STATES v. WILSON, 7 Pet. 150, 8 L. ed. 640, where Chief Justice Marshall commented on this point. See also EYSTER v. GAFF, 91 U. S. 521, 23 L. ed. 403. We submit that the Appellants are in error and they confuse the question of judicial notice of facts, evidence and the proceedings in another court with the question of proper judicial notice of public documents. The Supreme Court of North Carolina, of course, recognizes the law as established by the opinions of Federal courts and did so in this case. Likewise, the Trial Judge extended the same recognition to legal decisions of Federal courts in this class of cases but this is not to be confused with supplying facts, evidence and a judgment based thereon when an estoppel of some nature is contended for as a defense and must be pleaded and introduced in evidence.

In closing this point, we would emphasize that the decisions of the lower Federal courts are in our favor. In WHITE v. CENTRAL DISPENSARY AND EMERGENCY HOSPITAL, 99 F. 2d 355, the Circuit Court of Appeals for the District of Columbia on this point said:

> "The appellee seeks further to support its position in respect of judicial notice by referring to the records of the trial court in other judicial proceedings as showing that the appellee is a charitable institution organized under D. C. Code (1929), tit. 5, c. 5, Sec. 121 et seq., for the purpose of providing 'a suitable building in the City of Washington, District of Columbia for a Dispensary where all needy persons, without distinction, may be provided gratuitously with medical and surgical service and treatment and with medicines.' Insofar as the records in the judicial proceedings referred to are sought to be taken advantage of as judicial holdings that the appellee is a charity, they are unavailing, even if the proper subject of judicial notice, because they cannot conclude the appellant in the instant case since he

was not a party to those proceedings. But the trial court could not take judicial notice of them and we cannot. A trial court cannot properly take judicial notice of the records before it between different parties. Murphy v. Citizens' Bank of Junction City, 82 Ark. 131, 100 S. W. 894, 12 Ann. Cas. 535; see Note, 11 L. R. A., N. S. 616, 1907. And a court of appeals cannot take judicial notice of what may appear upon the records of the subordinate courts within the boundaries of its judicial jurisdiction; it can act only upon the facts appearing in the record before it. Fitzgerald v. Evans, 8 Cir., 49 F. 426, 1892; In re Manderson, 3 Cir., 51 F. 501, 1892; Divide Creek Irrigation Dist. v. Hollinsworth, 10 Cir., 72 F. 2d 859, 96 A. L. R. 937, 1934; Bush v. Tecumseh Nat. Bank, 64 Neb. 451, 90 N. W. 236, 1902."

In PARIDY v. CATERPILLAR TRACTOR CO., 48 F. 2d 166, the Circuit Court of Appeals for the Seventh Circuit on this point said:

"It is true that a court will take notice of its own records, but it cannot travel for this purpose out of the record relating to the particular case; it cannot take notice of the proceedings in another case, even between the same parties and in the same court, unless such proceedings are put in evidence. **** (citing many cases) ****

"In absence of evidence to that effect, the reviewing court cannot take judicial notice that a case before the court had connection with one formerly decided by it. ****"

In GASOLINE PRODUCTS CO. v. CHAMPLIN REFINING CO., 46 F. 2d 511, the District Court on this point said:

"The bearing of the opinion in the above case consists in its reasoning and in its formulation of principles of law, so far as they are applicable to the instant case. I cannot, as urged by counsel for defendant, take judicial notice of the facts in the master's report mentioned in that case, nor use that opinion in any way except as an authority."

In BECKER STEEL CO. OF AMERICA v. CUMMINGS, 16 F. Supp. 601 on this point the District Court said:

"It is said further that in one of the proceedings in the initial suit brought by the plaintiff there is a certified copy of a decree of a West Virginia court by which a receiver of the plaintiff in dissolution was appointed. Such a paper is not a part of this bill, however, and facts set forth in it are not matter of judicial notice. A court will take judicial notice of its own records, but the notice does not extend to facts of evidentiary character alleged in papers filed by litigants in prior proceedings. National Casket Co. v. Stolts (C. C. A. 2) 174 F. 413. It is unnecessary, therefore, to consider whether the alleged receivership should be given extraterritorial effect."

We further urge upon this Court that as to whether or not the Supreme Court of North Carolina would take judicial notice of the judgment and supporting evidence and findings of fact in a Federal civil action is a question for that Court according to its local State law and not only is no Federal constitutional question presented but the decision is in accordance with the great weight of authority.

VII

THE APPELLANTS' BRIEF CONTAINS BURDENSOME, IRRELEVANT AND IMMATERIAL MATTER WHICH SHOULD BE DISREGARDED AND STRICKEN BY THE COURT.

MOTION

The Appellee, State of North Carolina, moves to strike from the Appellants' brief and from the records of this Court certain burdensome, irrelevant and immaterial matter, as follows:

(a) all of the Appendixes annexed to Appellants' brief, beginning on p. 80 and extending through p. 96;

(b) Finding of Fact No. 20 and Conclusion of Law No. 3, as appear in Appellants' brief, pp. 6, 7;

(c) Findings of Fact appearing in Appellants' brief on pp. 22, 23, 24;

(d) Findings of Fact appearing in Appellants' brief on pp. 61, 62, 63.

Argument upon the Motion

The records and newspaper articles, in fact all the matter appearing in the Apellants' Appendixes, relate to the golf course in question but none of these records or articles were ever introduced into evidence by the Appellants and none of this material was ever before the Trial Court or the Supreme Court of North Carolina. For example: On p. 80 of Appellants' brief appear excerpts as to facts which appear in the brief of the City of Greensboro, which was filed in the case of CITY OF GREENSBORO v. SIMKINS, 246 F. 2d 425. This was never before the Trial Court or the Supreme Court of North Carolina. In Appellants' brief, pp. 83, 84, 85, 86, 87, 88 appear an editorial of the *Greensboro Daily News* and following this appear certain newspaper articles about the golf course and also about the civil action in the Federal District Court. These were never introduced in evidence and were never before any of the State courts; they are simply put into the brief without any guarantee of authenticity or validity. In Appellants' brief on p. 89 appears a Resolution of the City Council of Greensboro which was never put in evidence and was never before any of the State Courts. Last of all, in the Appellants' brief on pp. 90, 91, 92, 93, 94, 95, 96 appear extracts from the Manual of Rules and Regulations of the Works Project Administration and Appellants rely upon this document in their Argument. This document was never presented to the Trial Court and was never before the Supreme Court of North Carolina.

We are familiar with the so-called "Economic Briefs" filed before this Court but we feel that the matter referred to above, which is not in the State Record or in the Transcript of Record before this Court, transcends all rules of brief-making. We believe that this Court desires to judge the State of North Carolina and the Supreme Court of that State justly and fairly, and, therefore, it will not take into consideration these documents and papers which the Prosecutor and the Trial Court had no opportunity to see or cross-examine about and which were never a part of the Record. In

fairness and justice the Appellee, State of North Carolina, asks that this matter be disregarded and stricken.

CONCLUSION

The Appellee, State of North Carolina, believes that it has shown the Court that on this Record no Federal question exists or has properly been raised below in the State Court, and, therefore, this Court does not have jurisdiction.

The Appellee believes that it has shown this Court that there is no basis on this Record for this Court to issue a writ of certiorari.

The Appellee believes that it has shown this Court that there is no question of *former jeopardy* or fundamental unfairness because of multiple criminal proceedings.

The Appellee believes that it has shown this Court that no question of *estoppel, collateral estoppel* or of *judicial notice* can aid the Appellants in this case and that the principles contended for by Appellants in these respects are not constitutional requirements.

The Appellee asks this Court to dismiss this appeal and to refuse to grant a writ of certiorari.

Respectfully submitted,

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FILE COPY

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1959

NO. 7

LEON WOLFE, GEORGE SIMKINS, JR.
JOSEPH STURDIVENT, SAMUEL MURRAY,
and ELIJAH H. HERRING, Appellants

vs.

STATE OF NORTH CAROLINA

Appeal from the Supreme Court of the State of North Carolina

REPLY TO BRIEF OF APPELLEE

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 7

Leon Wolfe, George Simkins, Jr.,
Joseph Sturdivent, Samuel Murray, and Elijah H. Herring

Appellants

v

State of North Carolina

Appeal from the Supreme Court of the State of North Carolina

REPLY TO BRIEF OF APPELLEE

The above-named appellants respectfully file this Reply To Brief of Appellee, State of North Carolina.

Corrections in Statement of the Case

On Page 6, under the first part of No. 6 under this heading, Appellee says of the Opinion of the United States District Court for the Middle District of North Carolina in **Simkins et al. v City of Greensboro et al., 149 Fed Supp 562,** and the affirming Opinion of the United States Court of Appeals for the Fourth Circuit, **246 Fed 2d 425:**

"If this Court will refer to the two Opinions filed by both the District Court of Appeals (sic) and the Circuit Court of Appeals, it will see that there is no recital of evidence or findings of fact in these two Opinions."

The North Carolina Supreme Court, in its Opinion in this case (R 115), said of the United States District Court's Opinion in the **Simkins Case:**

"Our knowledge of **the facts** in that case is limited to what appears in the published opinion." (Emphasis added.)

Appellants have numbered for identification and quoted verbatim twelve (12) "facts" from the Federal District Court's Opinion in the **Simkins Case.** (See Pages 13-15 of Appellants' Brief On The Merits.)

Appellee cannot wish these "facts" away nor make them disappear by merely saying that they are not there.

In the last part of No. 6 on Page 6 under this heading, Appellee says:

"We will discuss the racial aspects of the case later on but here it is sufficient to say that the Appellee, State of North Carolina, has never denied the right of colored citizens to play on this golf course, provided they become eligible as members on the same basis as white citizens."

The North Carolina Supreme Court, in its Opinion in this case (R 115), said of the **Simkins Case:**

> "On the facts presented to him, Judge Hayes issued an order enjoining racial discrimination in the use of the golf course."

Judge Johnson J. Hayes was the United States District Judge who tried the **Simkins Case.** He was born and reared and educated in North Carolina. Until his retirement since the **Simkins Case,** Judge Hayes had been for more than thirty years the first and only Judge of the United States District Court for the Middle District of North Carolina. He had practiced law in Greensboro (where the golf course here involved is located) before his appointment to the Bench. He had held court in Greensboro over those three decades and he was thoroughly familiar with the local scene. He is one of North Carolina's most distinguished sons and a Judge honored for his ability and integrity.

Is it conceivable that Judge Hayes, as the State Supreme Court found in its Opinion in this case that he did, would have "issued an order enjoining racial discrimination in the use of

the golf course," if Appellee's agencies had been completely spotless, as Appellee would have this Court believe, in operating this golf course without any racial discrimination?

Is it conceivable that, if racial discrimination had been wholly absent, Judge Hayes would have said in his Opinion (149 Fed Supp at 565):

> "This golf club permits white people to play without being members, or otherwise, except it requires the prepayment of greens fees. The plaintiffs here paid their fees, were forced off the course by being arrested for trespass. **Everybody knows this was done because plaintiffs were Negroes and for no other reason. This court can not ignore."?** (Emphasis added.)

This was one of "the facts" in the Opinion of the Federal District Court in the **Simkins Case,** which the North Carolina Supreme Court said it had "knowledge of."

Undoubtedly, Judge Hayes, being thoroughly familiar with the local scene, entertained the same view as that expressed by Mr. Justice Frankfurter in **Watts v Indiana, 338 US at 52: "And there comes a point where this Court should not be ignorant as judges of what we know as men."**

In support of this commonly and generally known racial discrimination at this golf course, which Judge Hayes said "everybody knows," Appellants have attached to their Brief On The Merits photographic reproductions of items from the daily newspapers in Greensboro, showing that this matter of racial discrimination and exclusion at this golf course was truly known to everybody in Greensboro and the environs covered by the widely circulated Greensboro Daily News and Greensboro Record.

The Record in this case also shows without contradiction (R 93) that those Jurors in this case who had played on Gillespie Park Golf Course "stated very frankly and freely in open court that they had played on this course without any requirements except the payment of greens fees."

In asking this Court to strike from Appellants' Brief On

The Merits the documents of common and general knowledge (Pages 59-60 of Appellee's Brief), Appellee (Page 60) says: "We are familiar with the so-called 'Economic Briefs' filed before this Court but we feel that the matter referred to above, which is not in the State Record or in the Transcript of Record before this Court transcends all rules of brief-making."

By its reference to "the so-called 'Economic Briefs' filed before this Court," Appellee doubtless has in mind such cases as **Muller v Oregon, 208 US 412.** But Appellants suggest that this Court considered the material which the late Mr. Justice Brandeis attached to his brief in **Muller,** not because the material dealt with economic and social matters, but because the material proved facts of common and general knowledge. This Court said in **Muller (208 US at 421):** "We take judicial cognizance of all matters of general knowledge."

Where racial discrimination and exclusion are so fixed and rampant at a public municipal golf course that a Federal District Judge feels called upon in his opinion to say that "everybody knows" it, Appellants believe that this presents a matter of common and general knowledge in the community which may be confirmed by material from such sources of common and general knowledge as the daily newspapers of a city like Greensboro.

Nor do Appellants believe that Appellee can close this Court's eyes to the bald admission by Appellee's agency, City of Greensboro, in its Brief and Appendix before the Court of Appeals in the **Simkins Case** (See Page 80 of Appellants' Brief On The Merits.): **"Until 1949, the City operated the golf course exclusively for white citizens."**

Of course, Appellee cannot dispute the following fact from Judge Hayes' Opinion in the **Simkins Case,** because the State Supreme Court in its Opinion in this case (R 115) said that it had knowledge of this fact: "The Negroes have not only been denied the privilege of the golf course but there is no intention on the part of the defendants to permit them to do so unless they are compelled by order of court." (149 Fed Supp at 563)

For the same reason Appellee cannot dispute the following fact in Judge Hayes' Opinion in the **Simkins Case**: "Although the golf course has been available to the public for many years, whether by design or otherwise, Negroes have been denied the enjoyment of the privilege." (149 Fed Supp at 563)

In addition to all of the above, Clyde Bass, Assistant Golf Pro (who was an agent of the State—see Record Pages 95-96, Finding of Fact No. 30) testified (R 45): "To my knowledge no Negroes have ever played at Gillespie Park Golf Course before this date. Some Negroes have presented themselves before this date to play, but none have played to my knowledge."

It is also a fact that, in answering Appellants' exceptions to the trial court's actions in denying Appellants the opportunity to prove by the State's agents the reasons why those agents had excluded Negroes from the golf course, Appellee, on Page 13 of its brief before the State Supreme Court, said:

> "These exceptions relate to the exclusion of certain evidence by the trial court. **The question of whether or not Negroes had previously been refused to play on the golf course is utterly immaterial.**" (Emphasis added.)

In answer to such an obvious "prima facie case" under this Court's "rule of exclusion" (See Hernandez v Texas, 347 US 475, 98 L ed 866, 74 S Ct 667, and Eubanks v Louisiana, 356 US 584, 2 L ed 2d 991, 78 S Ct 970.), Appellee offered the statement of its agent, Assistant Golf Pro Clyde Bass, and nothing more, that he denied Appellants their right to play on the golf course because "it was a private club for members and invited guests only."

Appellants respectfully submit that this attempted rebuttal of the prima facie case is much weaker than that held insufficient in **Hernandez, supra,** where five jury commissioners testified that they had not discriminated in the selection of jurors, and also that held insufficient in **Eubanks, supra,** where the current judges involved testified that they had not discriminated in the selection of grand jurors.

Appellants believe that the case of racial discrimination against them by the State's agents thus stands proved; that the use of the statute, GS 14-134, to make good that racial discrimination, renders that statute, "as applied" in this case, unconstitutional under the Fourteenth Amendment; and that the jail sentences imposed under this unconstitutional application of GS 14-134 must therefore fall with the statute as here "applied."

In No. 9 under its Statement of the Case, Page 7 of its Brief, Appellee says: "If the Court will examine the Motion to Quash (R-32) it will see that the Appellants do not attack directly the constitutionality of Sec. 14-134 of the General Statutes but Appellants complain of the administration of the statute in view of the decision of the Federal Court and because of the Supremacy Clause of the United States Constitution."

Appellants believe that the words of the Motion to Quash speak for themselves: ". . . that GS 14-134 is hereby being unconstitutionally applied to these defendants, . . ." in violation of the Supremacy Clause and the Fourteenth Amendment.

In **Raley v Ohio, __US__, 3 L ed 1344, 1353**, this Court said: "'It is essential to our jurisdiction on appeal . . . that there be an explicit and timely insistence in the state courts that a state statute, **as applied**, is repugnant to the Federal Constitution, treaties or laws.'" (Emphasis added.)

Appellants believe that their allegation that "GS 14-134 is hereby being unconstitutionally applied" to them meets this test, even to the extent of using the identical word "applied."

REPLY TO APPELLEE'S ARGUMENT I

Appellee's Argument I, which begins on Page 14 and ends on Page 35 of its Brief, reads as follows:

> "THE SUPREME COURT OF NORTH CAROLINA DECIDED THIS CASE ON AN INDEPENDENT, ADEQUATE AND TENABLE NONFEDERAL GROUND, AND THERE IS NO FEDERAL QUESTION FOR THE REVIEW OF THIS COURT."

The most noticeable thing about this argument, as it appears in Appellee's Brief, is that Appellee seeks support for it almost everywhere except in the Opinion of the Supreme Court of North Carolina **IN THIS CASE.**

This is not surprising to Appellants, however, for, in Appellants' view, this argument does not find support in the State Supreme Court's Opinion **in this case.**

Starting with the 7th line of the State Supreme Court's Opinion in this case (R 108), we find the following statement as to how the State Supreme Court was deciding this case:

"Before considering the merits of the cases, we must ascertain if defendants were properly called upon to answer the criminal charges leveled against them. The motions to quash assign three reasons why defendants should not be called upon to answer the allegation that they violated the criminal laws of the State of North Carolina.

"S. v. Cooke, 246 NC 518, 98 SE 2d 885, is relied upon for two of the three reasons assigned. An examination of that case is necessary **to assay the merits** of the motions." (Emphasis added.) (Of course, Appellants contend that the Motion to Quash (R 32) speaks for itself as to how many reasons were assigned and what the reasons were.)

Since both the Motion to Quash (R 32) and the Motion To Set Aside the Verdict (R 91) alleged substantial Federal Questions, how could the State Supreme Court consider **"the merits of the cases"** and assay **"the merits"** of the Motion to Quash, if it was about to decide "this case on an independent, adequate and tenable nonfederal ground," as Appellee says in this argument?

After assaying **"the merits"** of the Motion to Quash, the State Supreme Court closed its considerable discussion with this paragraph (R 110):

"Since none of the reasons nor all combined sufficed to sustain the motion to quash, the court correctly overruled the

motion and put defendants on trial for the offense with which they were charged."

Appellants believe that this is as clear a statement as could be made that "none of the" Federal grounds "nor all combined," as alleged in the Motion to Quash, "sufficed to sustain" Appellants' allegations "that GS 14-134 is hereby being unconstitutionally applied to these defendants" (R 32) and that making Appellants stand trial under the warrants here involved was an attempt of the Appellee "to make a crime out of specific acts and conduct which both the United States District Court for the Middle District of North Carolina and the United States Court of Appeals for the Fourth Circuit have specifically held to be protected by the Fourteenth Amendment to the Constitution of the United States" (R 32).

Since the State Supreme Court assayed and passed upon "**the merits**" of the Motion to Quash, the following principle, as stated in **Raley v Ohio, supra, (3 L ed 2d at 1354)**, becomes applicable:

> **"There can be no question as to the proper presentation of a federal claim when the highest state court passes on it."**

Of course, "**'Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of federal law; and where a case coming from a state court presents that question, this Court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court.'**" (See **Staub v City of Baxley** and other cases cited by Appellants on Pages 26-28, and **Angel v Bullington on Page 34**, of their Brief On The Merits.)

Not only did the State Supreme Court sustain the action of the trial court in overruling the Motion to Quash on "**the merits,**" but it specifically passed upon the question of Double Jeopardy set up in the Motion to Quash. The State Su-

preme Court said (R 109): **"It is manifest there is here no double jeopardy."**

Now, the words "Double Jeopardy," when considered under the Fourteenth Amendment of the Constitution of the United States in connection with criminal prosecutions in state courts, have become synonymous, in Appellants' view, with the words "fundamental unfairness." **(See Hoag v New Jersey, 356 US 464, 467, 2 L ed 2d 913, 917, 78 S Ct 829.)**

Appellants therefore contend that, when the State Supreme Court said in this case (R 109) that, "It is manifest there is here no double jeopardy," this was tantamount, under the decisions of this Court construing the meaning of 'Double Jeopardy" under the Fourteenth Amendment, to saying, in relation to the allegations of Appellants' Motion to Quash and Motion To Set Aside the Verdict, that "It is manifest there is here no fundamental unfairness in the trial of this case."

In this view, Appellants believe that this decision by the State Supreme Court that "It is manifest there is here no double jeopardy," was sufficient to bring before this Court all of the questions of "fundamental unfairness" which Appellants discuss on Pages 59-71 of their Brief On The Merits.

Appellants feel especially that this should be so, since the Motion to Quash alleged (R 34) that "such prosecution would violate the rights of the defendants and laws of the United States, including the Fourteenth Amendment," and also since the Motion To Set Aside the Verdict alleged (R 93) that "to permit this verdict to stand under these circumstances would violate the rights of the defendants under the Constitution and laws of the United States, including the due process and equal protection clauses of the 14th Amendment."

As to the North Carolina Supreme Court's change of its rule that GS 14-134 applied only to lands "privately held" (See Page 65 of Appellants' Brief On The Merits), it is also true that Appellants raised this question at the first opportunity, namely, after the State Supreme Court had held for **the first time in this case** that GS 14-134 applies to public lands.

Since no petition for rehearing is permitted in a criminal case in the Supreme Court of North Carolina (R 139), this contention that this change of the rules violated fundamental fairness could not be called to the attention of the State Supreme Court.

Appellants do not claim any "vested right in prior decisions" of the North Carolina Supreme Court, as Appellee suggests on Page 27 of its Brief. We are here discussing Appellee's contention that this Court is without jurisdiction to consider this question of fundamental unfairness, and when that question must be raised in the state courts. (See discussion of **NAACP v Alabama** on this point, on Page 66 of Appellants' Brief On The Merits.)

Relying upon the prior rule that GS 14-134 applied only to lands "privately held," Appellants did call this prior rule of the Supreme Court of North Carolina to the attention of the trial court in the Motion To Set Aside the Verdict (R 95), but Appellants' contention as to what the rule of the Supreme Court of North Carolina was at that time was overruled by the trial court. Appellants could not anticipate that the State Supreme Court would change its rule, and therefore Appellants could not raise this particular question of fundamental unfairness until after the State Supreme Court had rendered its decision in this case.

As to Appellants' contention that the "lack of standards in the license-issuing practice" for playing on the golf course constituted "a denial of equal protection," this question was clearly before both the trial court and the State Supreme Court in the Opinion of Judge Hayes in the **Simkins Case,** where Appellee's agency, Gillespie Park Golf Club, Inc., contended that its rules and regulations constituted "administrative remedies" which Appellants had not exhausted. (149 Fed Supp at 565) In denying this contention, Judge Hayes said: "Moreover, there existed no known or uniform procedure of an administrative nature to be exhausted by plaintiffs." (149 Fed Supp at 565)

Besides, as shown above, Appellants alleged specifically

that both the prosecution and the verdict denied to Appellants the equal protection of the laws under the 14th Amendment. Of course, the State Supreme Court said that it had knowledge of what was in Judge Hayes' Opinion.

As to the "fundamental unfairness" of the State's adverse witness rule, it is not disputed that Pages 78 and 79 of the Record show that this rule suppressed vital material known to the State through its agent, the president of the golf corporation.

It is not disputed that in its Motion To Set Aside the Verdict Appellants alleged that to permit the verdict (obviously based upon this suppression) to stand "would violate the rights of these defendants under the Constitution and laws of the United States, including the due process and equal protection clauses of the 14th Amendment." (R 93)

It is not disputed that Appellants' objection to the effect of this adverse witness rule was overruled by the trial court (R 78) or that this action of the trial court was sustained by the State Supreme Court (R 118) in response to the following contention of Appellee on Page 13 of its Brief before the State Supreme Court:

> **"Of course, there was no error in the Court refusing to allow the witness Hughes to be called as an adverse witness. . . . This was a matter in this discretion of the Court, and counsel for defendants have evidently confused Federal practice with State practice."**

It cannot be disputed that the witness Hughes was in fact adverse. The Record shows this clearly. (R 78-79)

When this witness was on the stand as president of the golf corporation, in effect it was the State which was testifying and what was known to this witness was constitutionally known to the State. **(See Cooper v Aaron, 358 US 1.)**

Appellants believe that these facts bring this constitutional question properly before this Court.

REPLY TO APPELLEE'S ARGUMENT II

Appellee's Argument II, which begins on Page 35 of its Brief, reads as follows:

> "APPELLANTS' CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY ANY ALLEGED MULTIPLE TRIALS NOR DOES ANY QUESTION OF FORMER JEOPARDY ARISE BECAUSE APPELLANTS WERE TWICE TRIED OR BECAUSE BILLS OF INDICTMENT WERE PROCURED IN THE SUPERIOR COURT OF GENERAL JURISDICTION."

Appellants' Motion to Quash (R 35) and Motion To Set Aside the Verdict, by reference (R 92), alleged double jeopardy in violation of the Federal Constitution.

The State Supreme Court in its Opinion (R 109) specifically held: "It is manifest there is here no double jeopardy."

Since the State Supreme Court decided this Federal question of double jeopardy, as raised by Appellants in their Motion to Quash and Motion To Set Aside the Verdict, "there can be no question as to the proper presentation of" this Federal question. **Raley v Ohio, supra.**

Double jeopardy under the Fourteenth Amendment means "fundamental unfairness" under the decisions of this Court **(Hoag v New Jersey, supra)**, and thus when the question of double jeopardy is raised under the 14th Amendment, the question of "fundamental unfairness" is thereby necessarily raised, notwithstanding Appellee's suggestion to the contrary on Page 39 of its Brief. In **Hoag v New Jersey, supra**, it was made explicitly clear that under the decisions of this Court it is not multiple trials as such by state courts which may offend the 14th Amendment, but "The question in any given case is whether such a course has led to fundamental unfairness." In determining whether a state has practiced "fundamental unfairness" in conducting multiple criminal proceedings against defendants for the same acts and conduct, all of the facts and circumstances must be considered together, even though one fact or circumstance, standing alone, might not show "fundamental unfairness."

REPLY TO APPELLEE'S ARGUMENT III

Appellee's Argument III, which begins on Page 42 of its Brief, reads as follows:

"THE FEDERAL CONSTITUTION DOES NOT COMPEL THE STATE TO EXTEND TO THE APPELLANTS THE DOCTRINE OF ESTOPPEL OR COLLATERAL ESTOPPEL AND IRRESPECTIVE OF ANY CONSTITUTIONAL REQUIREMENTS THESE FORMS OF ESTOPPEL ARE NOT APPLICABLE IN THIS CASE."

Appellee clearly confuses the question of estoppel or collateral estoppel with the question of whether or not the Declaratory Judgment of the Federal Court for the Middle District of North Carolina in the **Simkins Case,** under the Supremacy Clause became a part of "the supreme Law of the Land, by which "the Judges in every State shall be bound . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

This Court, in **Garner v Teamsters etc., 346 US 485, 500, 98 L ed 228, 245, 74 S Ct 161,** defined the issue and made the distinction, which Appellee fails to make, as follows:

> **"We conclude that when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land, and cannot be curtailed, circumvented or extended by a State procedure merely because it will apply some doctrine of private right."**

It is because of this supremacy which attaches to the judgments of Federal Courts, as cases "when federal power constitutionally is exerted," that 28 USC 2283 authorizes Federal Courts to issue injunctions against state court proceedings, including criminal prosecutions, when necessary "to protect or effectuate" the judgments of such Federal Courts.

It is then a question, not of estoppel or collateral estoppel, but a question of supremacy under Article VI of the Constitution of the United States. **(See Thomason v Cooper, 254 Fed 2d 808, 810.)** The Federal Declaratory Judgment in the

Simkins Case became "the supreme law of the land, and cannot be curtailed, circumvented" by the criminal proceedings in this case.

REPLY TO APPELLEE'S ARGUMENT IV

Appellee's Argument IV, on Page 48 of its Brief, reads as follows:

> "THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION HAS NO APPLICATION IN THIS CASE."

In addition to what has been said above in the Reply to Appellee's Argument III, another word should here added. Neither under Argument IV nor elsewhere in its Brief does Appellee recognize the fact that this golf course was originally built with 65 per cent of its cost coming from Federal funds made available under Federal law.

In the Federal District Court's Opinion in the **Simkins Case**, appears this statement of fact (149 Fed Supp at 563): "Through Works Progress Administration, which furnished 65 per cent of the cost, the City of Greensboro built the last nine holes and agreed not to sell or lease for private use this public property during its life of usefulness." The Court's Findings of Fact were even more explicit. (See Page 6 of Appellants' Brief On The Merits.)

The fact that this was a Federal WPA project necessarily brought before the state courts, and brings before this Court, the Federal statute and its supporting regulations, under which this WPA grant was made to finance from Federal funds 65 per cent of the original cost of this golf course.

Appellants discuss the question at length, starting on Page 38 of their Brief On The Merits.

In **Grand River Dam Authority v Grand-Hydro, 355 US 359, 369-370, 93 L ed 64, 72,** this Court said:

> "As the question is thus presented whether the Federal Power Act has so far affected the use or value of this land for power site purposes as to deprive it of all fair

market value for those purposes and thus deprive the evidence of such value of all probative weight in this case, the fact that the state court purported to rest its decision largely on state law does not eliminate our duty to consider the question to the extent that it arises under federal law . . . It is, of course, for us to examine whether questions of federal law were necessarily, although only impliedly, adjudicated by the state court."

So, the fact that neither the State Supreme Court, nor Appellee mentions the Federal law under which 65 per cent of the original funds for this golf course was secured by the State's agencies, does not remove the Federal Emergency Relief Appropriation Act of 1939, 53 Stat 927, and its supporting regulations from this case. This raises vitally important questions under the Supremacy Clause.

REPLY TO APPELLEE'S ARGUMENT V

Appellee's Argument V, which begins on Page 48 of its Brief, reads as follows:

"THERE IS NO EVIDENCE THAT THE APPELLANTS HAVE BEEN DEPRIVED OF ANY RIGHTS OR PRIVILEGES GUARANTEED BY THE FOURTEENTH AMENDMENT."

Whether or not the uncontroverted happenings in this case show that Appellee's agents were guilty of racial discrimination against Appellants, within this Court's "rule of exclusion" **(See Hernandez v Texas and Eubanks v Louisiana, supra.)** is, of course, for this Court to decide.

In **Niemotko v Maryland, 340 US 268, 271, 95 L ed 267, 270, 71 S Ct 325,** this Court said:

"In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded."

There is, however, one special point under Argument V which should be mentioned. It involves the following pro-

vision of the By-Laws of the golf corporation, quoted by Appellee on Page 50 of its Brief: "The golf course and its facilities shall be used only by members, their invited guests, members in good standing **of other golf clubs,** members of the Carolina Golf Association, pupils of the Professional and his invited guests.***" (Emphasis added.)

When it appeared that the provision, "members in good standing of other golf clubs" would include the Nocho Park Golf Club to which Appellants belonged, Appellee's agents found no difficulty in adding an **UNWRITTEN** part to this provision, so that it would exclude those golf clubs which were not members of the Carolina Golf Association. (R 51)

This proves what Judge Hayes said in his Opinion, when the golf corporation contended that Appellants had not exhausted their "administrative remedies," for in denying this contention Judge Hayes found (149 Fed Supp at 565): "Moreover, there existed no known or uniform procedure of an administrative nature to be exhausted by plaintiffs."

REPLY TO APPELLEE'S ARGUMENT VI

Appellee's Argument VI, which begins on Page 54 of its Brief, reads as follows:

> "THE SUPREME COURT OF NORTH CAROLINA WAS NOT REQUIRED TO TAKE JUDICIAL NOTICE OF THE EVIDENCE, FACTS, FINDINGS OF FACT AND JUDGMENT ENTERED BY THE FEDERAL DISTRICT COURT IN THE CIVIL ACTION."

Whether required to do so or not, the Supreme Court of North Carolina did take judicial notice of the Federal District Court's Opinion, saying (R 115): **"Our knowledge of the facts in that case is limited to what appears in the published opinion."** Appellee does not explain why the Findings of Fact, Conclusions of Law, and Decree and Injunction of the Federal District Court are entitled to less respect than the Federal District Court's Opinion.

But, be that as it may, since Federal rights are involved,

it is for this Court to determine what documents and facts in this case are entitled to judicial notice. **Lilly v Grand Trunk Western Railroad Company, 317 US 481, 488, 87 L ed 411, 416, 63 S Ct 347,** was a case coming from a state court and this Court determined that a rule of the Interstate Commerce Commission must be taken judicial notice of by the state courts.

Under its Argument VI Appellee also gives its answer to the "Question of Offering the Federal Records in Evidence," which Appellants discuss on Pages 48-50 of their Brief On The Merits. Nothing more needs to be said here, except to suggest that Appellee cannot be serious when it says that "the Supreme Court of North Carolina did not know what 'these' meant," in referring to Defendants' Exhibits 6 and 7, in view of the fact that the North Carolina Supreme Court, in the exercise of its wide discretion, did in fact go outside the record before it to find that "these" Exhibits 6 and 7 were "identified" (R 115).

REPLY TO APPELLEE'S ARGUMENT VII

Appellee's Argument VII, which begins on Page 59 of its Brief, reads as follows:

> "THE APPELLANTS' BRIEF CONTAINS BURDENSOME, IRRELEVANT AND IMMATERIAL MATTER WHICH SHOULD BE DISREGARDED AND STRICKEN BY THE COURT."

Appellants believe that every document attached to their Brief On The Merits (Pages 80 to 98) and the other documents mentioned under its Argument VII by Appellee, are documents which may be judicially noticed by this Court, for the reasons set forth by Appellants under "The Question of Judicial Notice," on Pages 72 to 77 of their Brief On The Merits.

Further discussion of what Appellee says under Argument VII may be found under Appellants' "Corrections of Statement of the Case" above.

Conclusion

Wherefore, Appellants renew the prayer contained in their Brief On The Merits.

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SUPREME COURT OF THE UNITED STATES

No. 7.—October Term, 1959.

Leon Wolfe, George Simkins, Jr., et al., Appellants, *v.* State of North Carolina.	On Appeal From the Supreme Court of North Carolina.

[June 27, 1960.]

Mr. Justice Stewart delivered the opinion of the Court.

The appellants were convicted of violating a North Carolina criminal trespass statute,[1] and their convictions were upheld by the Supreme Court of North Carolina, 248 N. C. 485, 103 S. E. 2d 846. This appeal, grounded on 28 U. S. C. § 1257 (2),[2] attacks the constitutional validity of the statute as applied in this case. Because of doubt as to whether any substantial federal question was presented to or decided by the state courts, we postponed further consideration of the question of jurisdiction until the hearing of the case on the merits. 358 U. S. 925, 359 U. S. 951. For reasons to be stated, we have concluded that the appeal must be dismissed.[3]

[1] "If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars, or imprisoned not more than thirty days: . . . ." N. C. Gen. Stat. § 14–134. This statute was first enacted in 1866. North Carolina Laws, Special Session, Jan., 1866, c. 60.

[2] "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . .

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

[3] The appellants ask that the appeal be treated as a petition for certiorari in the event it is found that the appeal was improperly

There is no dispute as to the basic circumstances which led to the prosecution and ultimate conviction of the appellants. In December, 1955, Gillespie Park Golf Club, Inc., operated an 18-hole golf course on land which it leased from the City of Greensboro, North Carolina, and the Board of Trustees of the Greensboro City Administrative Unit. The bylaws of the lessee limited the use of the golf course to its "members" and persons in certain other specifically restricted categories.[4] On December 7, 1955, the appellants, who are Negroes, entered the club's golf shop and requested permission to play on the course. Their request was refused. Nevertheless, after placing some money on a table in the golf shop, the appellants proceeded to the course and teed off. After they had played several holes the manager of the golf course ordered them to leave. They refused. The manager then summoned a deputy sheriff, and, after the appellants were again ordered to leave the course and they had again refused, they were arrested upon warrants sworn to by the manager.

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taken. See 28 U. S. C. § 2103. The considerations which require dismissal of the appeal in this case also require denial of a petition for certiorari. See 28 U. S. C. § 1257 (3).

[4] The relevant provisions of the bylaws were as follows: "Section 1—Membership. Membership in this corporation shall be restricted to members who are approved by the Board of Directors for membership in this Club. There shall be two types of membership; one, the payment of a stipulated fee of $30.00 or more, plus tax, shall cover membership and greens fees. The other type of membership shall be $1.00, plus tax, but this type of member shall pay greens fees each time he uses the course. The greens fees and the amount of membership fees may be changed by the Board of Directors at any time upon two-thirds vote of the members of the Board.

"Section 2—Use of Golf Facilities. The golf course and its facilities shall be used only by members, their invited guests, members in good standing of other golf clubs, members of the Carolina Golf Association, pupils of the Professional and his invited guests."

The appellants were tried and convicted of violating the state criminal trespass statute. Pending their appeal to the Supreme Court of North Carolina they and others commenced an action against the City of Greensboro, the Greensboro Board of Education, and the Gillespie Park Golf Club, Inc., in the Federal District Court for the Middle District of North Carolina, asking for a declaratory judgment and an injunction forbidding the defendants from operating the golf course on a racially discriminatory basis. The federal court granted the injunction. *Simkins* v. *City of Greensboro*, 149 F. Supp. 562. Its judgment was affirmed by the Court of Appeals for the Fourth Circuit on June 28, 1957. *City of Greensboro* v. *Simkins*, 246 F. 2d 425. On the same date the Supreme Court of North Carolina, acting on the appeal from the criminal convictions in the state court, held that there had been a fatal variance in amendments to the warrants under which the appellants had been tried, and arrested the judgments against them. *State* v. *Cooke*, 246 N. C. 518, 98 S. E. 2d 885.

The appellants were again tried *de novo* in the Superior Court of Guilford County, North Carolina, for violating the state criminal trespass statute. At the outset they made a motion to quash, which was denied. The State presented evidence as to what had happened on the golf course on December 7, 1955. At the conclusion of the evidence the trial judge instructed the jury explicitly and at length that the defendants could not be convicted if they had been excluded from the golf course because of their race. Specifically, the trial judge charged the jury that ". . . the law would not permit the City and, therefore, would not permit its lessee, the Gillespie Park Golf Club, Inc., to discriminate against any citizen of Greensboro in the maintenance and operation and use of a golf course. It could not exclude either defendant because of his race or for any other reason applicable to them

alone; that is to say, they were entitled to the same rights to use the golf course as any other citizen of Greensboro would be provided they complied with the reasonable rules and regulations for the operation and maintenance and use of the golf course. They would not be required to comply with any unreasonable rules and regulations for the operation and maintenance and use of the golf course."[5] The jury returned a verdict of guilty. A motion to set aside the verdict was denied.

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[5] The trial judge's instructions in their entirety on this aspect of the case were as follows:

"Now, if the State has satisfied you from the evidence and beyond a reasonable doubt that the land in question, that is the golf course property, was the land of the corporation, that it had the actual possession of the property and that the defendants entered upon the land intentionally and that they did so after being forbidden to do so by an agent or employee of the corporation who was authorized to tell them that they could not play golf, then, nothing else appearing that would constitute a violation of the statute. However, although the State may prove beyond a reasonable doubt in a prosecution under this statute that the accused intentionally entered upon the land in the actual possession of the corporation after being forbidden to do so by an agent of the corporation and thereby establish as an ultimate fact that the accused entered the property without legal right, the accused may still escape conviction by showing as an affirmative defense that he entered under a bona fide claim of right.

"Bona fide claim of right means a claim of right in good faith or bona fide itself means in good faith. That is to say, when the defendants seek to excuse an entry without legal right as one taking place under a bona fide claim of right, then the burden is upon such defendant to show two things: not beyond a reasonable doubt or even by the greater weight of the evidence, but merely to the satisfaction of the jury, first, that he believed he had a right to enter; and second, that he had reasonable grounds for such belief.

"Now, the defendants by their plea of not guilty deny their guilt of each and every element of the offense charged, but they further say and contend that even if it be found that the land in question was in the actual possession of the corporation and that they entered the land intentionally and that they did so and remained there after being forbidden to do so, they say that even if that be found the

The Supreme Court of North Carolina affirmed the convictions. In doing so the court recognized that "[s]ince the operator of the golf club was charged with making a public or semipublic use of the property, it could not deny the use of the property to citizens simply because they were Negroes. . . . Since the decision in *Brown* v. *Board of Education*, 347 U. S. 483 . . . separation of the races in the use of public property cannot be required."

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they did so under a bona fide claim of right and that they believed they had a right to enter and that they had reasonable grounds for such belief.

"Now, as to that question which arises upon the evidence, I instruct you then, ladies and gentlemen of the jury, that under the law as determined by the United States Court and as pronounced by them, the Gillespie Golf Club, Inc., by leasing the land from the City of Greensboro to use as a golf course was subjected to the same obligations as the City of Greensboro would have been had it operated a golf course itself. It was subjected to the same rights as the City would have had, the same obligations and same responsibilities; that is to say, the law would not permit the City and, therefore, would not permit its lessee, the Gillespie Park Golf Club, Inc., to discriminate against any citizen of Greensboro in the maintenance and operation and use of a golf course. It could not exclude either defendant because of his race or for any other reason applicable to them alone; that is to say, they were entitled to the same rights to use the golf course as any other citizen of Greensboro would be provided they complied with the reasonable rules and regulations for the operation and maintenance and use of the golf course. They would not be required to comply with any unreasonable rules and regulations for the operation and maintenance and use of the golf course.

"Furthermore, I instruct you that your verdict will not be prompted in any manner whatsoever by the race of the defendants. That has absolutely nothing to do with the case in law and should not be considered by you. Under the law, all citizens have equal rights and equal responsibilities in the maintenance and use of public facilities, that is facilities maintained by the governmental unit in which they live, and therefore the fact that the defendants are Negroes certainly may not be considered to their prejudice nor to the prejudice of the State."

248 N. C., at 491, 103 S. E. 2d 850–851. The court quoted with approval the trial judge's instructions to the jury on this aspect of the case. It is from this judgment of the Supreme Court of North Carolina that the present appeal was taken.

The appellants contend that the Supremacy Clause and the Fourteenth Amendment required the North Carolina court to hold that the findings of fact and judgment of the federal court in the civil case of *Simkins* v. *City of Greensboro*, 149 F. Supp. 562, conclusively established contrary to the verdict of the jury in this case, that the state statute was used here to enforce a practice of racial discrimination by a state agency. The Supreme Court of North Carolina took cognizance of the federal court's published opinion in the *Simkins* case and commented with respect to it:

> "Examining the opinion, it appears that ten people, six of whom are defendants in this action, sought injunctive relief on the assertion that Negroes were discriminated against and were not permitted to play on what is probably the property involved in this case. We do not know what evidence plaintiffs produced in that action. It is, however, apparent from the opinion that much evidence was presented to Judge Hayes [in the Federal District Court] which was not before the Superior Court when defendants were tried. It would appear from the opinion that the entry involved in this case was one incident on which plaintiffs there relied to support their assertion of unlawful discrimination, but it is manifest from the opinion that that was not all of the evidence which Judge Hayes had. We are left in the dark as to other incidents happening prior or subsequent to the conduct here complained of, which might tend to support the assertion of unlawful

discrimination. On the facts presented to him, Judge Hayes issued an order enjoining racial discrimination in the use of the golf course. Presumably that order has and is being complied with. No assertion is here made to the contrary." 248 N. C., at 493, 103 S. E. 2d, at 852.

The North Carolina court did not decide, however, whether it was bound under the Constitution to give to the federal court's unpublished findings and judgment in the prior civil action the conclusive effect urged by the appellants in the present criminal case, because it held that as a matter of state law the findings and judgment were not before it.*

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*Although not reaching the merits of the claim that the Constitution would compel it to hold that the federal judgment operated as a collateral estoppel in the present case, the North Carolina court discussed the question of collateral estoppel at some length in its opinion by way of *obiter dicta:*

"The mere assertion that a court of this State has not given due recognition to a judgment rendered by one of our Federal courts merits serious consideration. . . .

"When the doctrine of collateral estoppel should be applied is not always easily solved. In *Van Schuyver* v. *State*, 8 P. 2d 688, it was held that a judgment in a civil action between prosecuting witness and defendant which determined the ownership of domestic fowl could not be used by the defendant in a criminal action to estop the State from prosecuting him on a charge of larceny. Similar conclusions have been reached in other jurisdictions with respect to the ownership of property. *State* v. *Hogard*, 12 Minn. 293; *People* v. *Leland*, 25 N. Y. S. 943; *Hill* v. *State*, 3 S. W. 764 (Tex.)

"It is said in the annotation to *Mitchell* v. *State*, 103 Am. St. Rep. 17: 'When the previous judgment arose in a case in which the state or commonwealth was the prosecutor or plaintiff and the defendant in the case at bar was also the defendant, and the judgment was with reference to a subject which is material to the case at bar, the doctrine of *res judicata* applies. (citations) But where the judgment to which it is sought to apply the doctrine of *res judicata* was rendered in a

It is settled that a state court may not avoid deciding federal questions and thus defeat the jurisdiction of this Court by putting forward nonfederal grounds of decision which are without any fair or substantial support. *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 455; *Staub* v. *City of Baxley*, 355 U. S. 313, 318–320; *Ward* v. *Love County*, 253 U. S. 17, 22. Invoking this principle, the appellants urge that the independent state grounds relied upon for decision by the Supreme Court of North Carolina were untenable and inadequate, and that the question whether the Federal Constitution compelled that the findings and judgment in the federal case operated as a collateral estoppel in this case was properly before the state court for decision. It thus becomes this Court's duty to ascertain whether the procedural grounds relied upon by the state court independently and adequately support its judgment.

The Supreme Court of North Carolina stated in its opinion of affirmance that the "defendants, for reasons best known to themselves elected not to offer in evidence

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civil proceeding to which the state was not a party, or in a criminal proceeding to which the defendant in the case at bar was not a party, the doctrine of *res judicata* does not apply. (citations)"

"The Supreme Court of the United States has recognized and applied the law as there announced to differing factual situations. Compare *U. S.* v. *Baltimore & O. R. Co.*, 229 U. S. 244, 57 L. Ed. 1169, and *Williams* v. *N. C.*, 325 U. S. 226, 89 L. ed. 1577. Other illustrations may be found in: *S.* v. *Dula*, 204 N. C. 535, 168 S. E. 836; *Warren* v. *Ins. Co.*, 215 N. C. 402, 2 S. E. 2d 17; *Powers* v. *Davenport*, 101 N. C. 286; *S.* v. *Boland*, 41 N. W. 2d 727; *People* v. *McKenna*, 255 P. 2d 452; *S.* v. *Morrow*, 75 P. 2d 737; *S.* v. *Cornwell*, 91 A. 2d 456; *S.* v. *Greenberg*, 109 A. 2d 669. Extensive annotations appear as a note to *Green* v. *State*, 87 A. L. R. 1251; 30A Am. Jur. 518. 248 N. C., at 493, 495, 103 S. E. 2d, at 852, 853–854.

Compare what was said by this Court in *Hoag* v. *New Jersey*, 356 U. S. 464, 471: "Despite its wide employment, we entertain grave doubts whether collateral estoppel can be regarded as a constitutional requirement. Certainly this Court has never so held

the record in the Federal court case." 248 N. C., at 493, 103 S. E. 2d, at 852. This statement is borne out by the record before that court,[7] the so-called "case on appeal" prepared by the appellants themselves.[8] The appellants now advise us that in fact the federal court's findings and judgment were offered in evidence at the trial and

[7] In North Carolina, "[t]he 'transcript or record on appeal' [to the Supreme Court] consists of [1] the 'record proper' (i. e. summons, pleading and judgment) and [2] the 'case on appeal,' which last is the exceptions taken, and such of the evidence, charge, prayers, and other matters occurring at the trial as are necessary to present the matters excepted to for review." *Cressler* v. *Asheville*, 138 N. C. 482, 485, 51 S. E. 53, 54. The "record proper" includes "only those essential proceedings which are made of the record by the law itself, and as such are self-preserving," *State* v. *Gaston*, 236 N. C. 499, 501, 73 S. E. 2d 311, 313. The term "record" in this opinion refers, unless otherwise indicated, to that part of record on appeal which is contained in the "case on appeal" . . . *i. e.*, the transcript of the proceedings at the trial itself, containing the testimony of witnesses, proffers of evidence, exceptions and rulings thereon, etc., as selected and agreed upon by the parties.

[8] All that the record before the North Carolina court contained on this aspect of the case, here reproduced in its entirety, was "My name is Myrtle D. Cobb and I am Deputy Clerk in the Federal Court in Greensboro, and I have in my possession or it is my duty to keep in my possession public records concerning Federal cases and I do have in my possession the record in the case of Simkins, et al. v. The Gillespie Park Golf Course. I have all of the original papers in that case."

Eight pages later, following the transcript of the testimony of another witness, there appears in the record before the North Carolina court the following, also reproduced here in its entirety: "Mrs. Kennedy: If your Honor please, we'd like, if possible, to have a ruling on whether or not these would be admissible. Court: I am going to sustain the objection as to those two Exhibits, that is #6 and #7." There is nothing in the record before the North Carolina Supreme Court to indicate what "these" meant, and "Exhibits 6 and 7" were not further identified nor made part of the record as an offer of evidence as required by North Carolina law, *In re Smith's Will*, 163 N. C. 464, 79 S. E. 977, nor otherwise submitted to the Supreme Court of North Carolina.

excluded by the trial judge. They ascribe to "some quirk of inadvertence" their failure to include in their "case on appeal" the part of the transcript which would so indicate.* And they assert that, since the Supreme Court of North Carolina has "wide discretion" to go outside the record in order to get at the true facts, the Court's refusal

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* The appellants have included in an appendix to their brief an excerpt from the stenographic trial transcript. The trial transcript was made available to this Court after the argument, and the excerpt in question reads as follows:

"DIRECT EXAMINATION BY MRS. KENNEDY:

"Q. Will you state your name and address, please?

"A. I am Myrtle D. Cobb. I am deputy clerk in the Federal Court in Greensboro.

"Q. As Deputy Clerk in the Federal Court here in Greensboro, is it part of your duty to keep public records?

"A. Yes, it is.

"Q. Do you have a record in the case of Simkins, et al, vs. Gillespie Park Golf Course, et al?

"A. This is the case. It is all the original papers that went up to the Court of Appeals that was filed in our office.

"Q. Were the findings of fact part of that record?

"A. Yes.

"MRS. KENNEDY: Your Honor, at this time we'd like to offer into evidence a decree, the findings of fact, conclusions of law and opinion, as rendered by the Judge of the Federal Court, Middle District of Greensboro.

"MR. KORNEGAY: OBJECTION.

"THE COURT: Do you have anything further that you want to introduce in regard to that?

"MRS. KENNEDY: In addition to that, we have the opinion of the Circuit Court of Appeals on this case.

"MR. KORNEGAY: OBJECTION.

"THE COURT: Let the record show that is being offered in evidence. I will rule on it later.

"(The documents referred to were marked for identification DEFENDANTS' EXHIBITS 6 and 7.)

"THE COURT: Anything else?

"MRS. KENNEDY: Not with this witness, your Honor."

to do so here amounted to a refusal to exercise its discretion "to entertain a constitutional claim while passing upon kindred issues raised in the same manner." *Williams* v. *Georgia*, 349 U. S. 375, 383.

The difficulty with this argument, beyond the fact that the appellants apparently did not ask the North Carolina court to go outside the record for this purpose, is that that court has consistently and repeatedly held in criminal cases that it will not make independent inquiry to determine the accuracy of the record before it.[10] Illustrative decisions are: *State* v. *Robinson*, 229 N. C. 647, 50 S. E. 2d 740; *State* v. *Wolfe*, 227 N. C. 461, 42 S. E. 2d 515; *State* v. *Gause*, 227 N. C. 26, 40 S. E. 2d 463; *State* v. *Stewinter*, 211 N. C. 278, 189 S. E. 868; *State* v. *Dee*, 214 N. C. 509, 199 S. E. 730; *State* v. *Weaver*, 228 N. C. 39, 44 S. E. 2d 360; *State* v. *Davis*, 231 N. C. 664, 58 S. E. 2d 355; *State* v. *Franklin*, 248 N. C. 695, 104 S. E. 2d 837.

Thus in the *Robinson* case the court reversed a criminal conviction for insufficiency of the evidence, although noting that:

> "[T]he court below, in its charge . . . [referred] to . . . incriminating facts and circumstances which do not appear in the testimony included in the record

[10] In *civil* cases, the North Carolina Supreme Court, on motion of a party, has issued "a *certiorari* to give the [trial] Judge an opportunity to correct the 'case' already settled by him, [but] . . . such *certiorari* never issues (except to incorporate exceptions to the charge filed within ten days after adjournment: *Cameron* v. *Power Co.*, 137 N. C., 99) unless it is first made clear to the Court, usually by letter from the Judge, that he will make the correction if given the opportunity." *Slocumb* v. *Construction Co.*, 142 N. C. 349, 351, 55 S. E. 196, 197; *Sherril* v. *Western Union Telegraph Co.*, 116 N. C. 655, 21 S. E. 429; *Broadwell* v. *Ray*, 111 N. C. 457, 16 S. E. 408; *Lowe* v. *Elliott*, 107 N. C. 718, 12 S. E. 383. Here, the case on appeal was not settled by the trial judge, and no motion for certiorari was made.

before us. This would seem to indicate that the record fails to include all the evidence offered by the State.

"Be that as it may, the record on appeal imports verity, and this Court is bound thereby. (Citing cases.) This is true even though the case is settled by counsel, (citing cases) and not by the judge (citing cases) . . . .

"The Supreme Court is bound by the case on appeal, certified by the clerk of the Superior Court, even though the trial judge has had no opportunity to review it, and must decide questions presented upon the record as it comes here, without indulging in assumptions as to what might have occurred." 229 N. C., at 649–650, 50 S. E. 2d, at 741–742.

In *State* v. *Wolfe* the court reversed a criminal conviction on the ground of error in the trial court's instructions to the jury, although pointing out that:

"The quoted excerpts from the charge do not reflect the clarity of thought and conciseness of statement usually found in the utterances of the eminent and experienced jurist who presided at the trial below . . . . Even so, it [the record] is certified as the case on appeal. We are bound thereby and must decide the question presented upon the record as it comes here, without indulging in assumptions as to what might have occurred." 227 N. C., at 463, 42 S. E. 2d, at 516–517.

In the *Gause* case the court also reversed a conviction upon the ground of error in the charge, although noting that:

"Doubtless the use of the words 'greater weight of evidence' instead of 'beyond reasonable doubt' was a slip of the tongue or an error in transcribing. Never-

theless, it appears in the record, and we must accept it as it comes to us." 227 N. C., at 30, 40 S. E. 2d, at 466.

In the *Stiwinter* case, involving a similar issue, the court said:

"We are constrained to believe that this instruction has been erroneously reported, but it is here in a record duly certified . . . which imports verity, and we are bound by it." 211 N. C., at 279, 189 S. E., at 869.

The *Dee* case involved similar issues. There the court noted:

"It is suggested by the Attorney-General that, in all probability, a typographical error has crept into the transcript and that the word 'disinterested' was used where the word 'interested' appears. In this he is supported by a letter from the judge who presided at the trial, and upon this letter a motion for *certiorari* to correct the record has been lodged on behalf of the State . . . . [T]he transcript is not now subject to change or correction. *State* v. *Moore*, 210 N. C., 686, 188 S. E., 421 It imports verity and we are bound by it . . . . 'Under C. S., 643, if the case on appeal as served by the appellant be approved by the respondent or appellee, it becomes the case and a part of the record on appeal, and in connection with the record [proper], may alone be considered in determining the rights of the parties interested in the appeal . . . . The appeal must be heard and determined on the agreed case appearing in the record.'" 214 N. C., at 512, 199 S. E., at 732.

It is thus apparent that the present case is not of a pattern with *Williams* v. *Georgia*, *supra*. Even if the North Carolina Supreme Court has power to make inde-

pendent inquiry as to evidence proffered in the trial court but not included in the case on appeal, its decisions make clear that it has without exception refused to do so.[11] This is not a case, therefore, where the state court failed to exercise discretionary power on behalf of appellants' "federal rights" which it had on other occasions exercised in favor of "kindred issues."

The appellants contend additionally that they brought the federal court's findings and judgment in the *Simkins* case before the state courts in two other ways: (a) by their motion to quash at the outset of the trial, and (b) by their motion to set aside the verdict at the trial's conclusion. The motion to quash set out the existence and

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[11] In *Aycock* v. *Richardson*, 247 N. C. 233, 100 S. E. 2d 379, and *Mason* v. *Commissioners of Moore*, 229 N. C. 626, 51 S. E. 2d 6, the court went beyond the record for the restricted and quite different purpose of determining whether it had jurisdiction of the appeal, *i. e.*, to determine whether an appeal had been properly taken in accordance with North Carolina General Statutes 1-279 and 1-280. In other cases the North Carolina Supreme Court has remanded a cause for completion of the record on appeal because the *record proper* (as opposed to the case on appeal) lacked certain primary essentials. *State* v. *Butts*, 91 N. C. 524 (record failed to show that a court had been held by a judge or that a grand jury had been drawn, sworn, and charged); *State* v. *Farrar*, 103 N. C. 411, 9 S. E. 449 (same); *State* v. *Daniel*, 121 N. C. 574, 28 S. E. 255 (record did not show the organization of the court below or when and where the trial had been held). See also *Kearnes* v. *Gray*, 173 N. C. 717, 92 S. E. 149. In the same category must be placed those cases in which the North Carolina Supreme Court, on motion of a party, remanded the cause for correction of the *record proper*. See *State* v. *Brown*, 203 N. C. 513, 166 S. E. 396 (error in the transcription of the verdict); *State* v. *Mosley*, 212 N. C. 766, 194 S. E. 486 (omission in the transcription of the verdict). See also *State* v. *Marsh*, 134 N. C. 184, 47 S. E. 6 (case reversed because of omission of part of the indictment in the record on appeal). As to the important distinction in North Carolina between the record proper and case on appeal, see n. 7, *supra*.

alleged effect of the federal court proceedings, and requested leave to offer in evidence in support of the motion "the full record and judgment roll in said case." The motion to set aside the verdict incorporated by reference the motion to quash and also contained an independent summary of the federal court proceedings, requesting the court to take judicial notice of the same. Both motions were denied by the trial court without opinion.

As to the motion to quash, the Supreme Court of North Carolina sustained the trial court's ruling on the ground that the " 'court, in ruling on the motion, is not permitted to consider extraneous evidence. Therefore, when the defect must be established by evidence *aliunde* the record, the motion must be denied.' " 248 N. C., at 489, 103 S. E. 2d, at 849. In upholding the denial of the second motion, the Supreme Court of North Carolina declined to take judicial notice of the federal court's findings and judgment, for reasons discussed at some length in its opinion, and concluded that the appellants "were not, as a matter of right, entitled to have the verdict set aside." 248 N. C., at 495, 103 S. E. 2d, at 854. An independent examination of North Carolina law convinces us that the state court in both instances was following well-established local procedural rules; it did not make an *ad hoc* determination operating discriminatorily against these particular litigants.

At least since the decision in *State* v. *Turner*, 170 N. C. 701, 86 S. E. 1019, in 1915, it has been the settled rule in North Carolina that "[a] motion to quash . . . lies only for a defect on the face of the warrant or indictment." 170 N. C., at 702, 86 S. E., at 1020. The rule that a motion to quash cannot rest on matters *dehors* the record proper has, so far as investigation reveals, been rigidly adhered to

in all subsequent North Carolina decisions.[12] See *State* v. *Brewer*, 180 N. C. 716, 717, 104 S. E. 655, 656; *State* v. *Cochran*, 230 N. C. 523, 524, 53 S. E. 2d 663, 665; *State* v. *Andrews*, 246 N. C. 561, 565, 99 S. E. 2d 745, 748. In the present case the state court simply followed this settled rule of local practice.

A similar conclusion must be reached as to the denial of the motion made at the end of the trial. That motion requested "[t]hat the verdict rendered by the jury . . . be set aside, that the Court withhold and arrest judgment and discharge the defendants notwithstanding the verdict, or grant the defendants a new trial. . . ." Whether the motion be technically considered as one to set aside the verdict and grant a new trial or as one to arrest the judgment and dismiss the defendants, the action of the North Carolina Supreme Court in upholding its denial was clearly in conformity with established state law. "A motion to set aside the verdict and grant a new trial is addressed to the discretion of the court and its refusal to grant such motion is not reviewable on appeal." *State* v. *McKinnon*, 223 N. C. 160, 166, 25 S. E. 2d 606, 610; *State* v. *Chapman*, 221 N. C. 157, 19 S. E. 2d 250; *State* v. *Johnson*, 220 N. C. 252, 17 S. E. 2d 7. See also *State* v. *Wagstaff*, 219 N. C. 15, 19, 12 S. E. 2d 657, 660; *State* v. *Brown*, 218 N. C. 415, 422, 11 S. E. 2d 321, 325; *State* v.

[12] There is a statutory departure from the settled rule. A North Carolina statute, enacted more than 70 years ago, providing that "[a]ll exceptions to grand jurors for and on account of their disqualifications shall be taken . . . by motion to quash the indictment, and if not so taken, the same shall be deemed to be waived." N. C. Gen. Stat. 9-26. The North Carolina courts have held that when a motion to quash is employed to attack the qualification of grand jurors, the defendant may rely on evidence outside the record proper. See *State* v. *Gardner*, 104 N. C. 739, 10 S. E. 146; *State* v. *Peoples*, 131 N. C. 784, 42 S. E. 814; *State* v. *Speller*, 229 N. C. 67, 47 S. E. 2d 537; *Miller* v. *State*, 237 N. C. 29, 74 S. E. 2d 513; *State* v. *Perry*, 248 N. C. 334, 103 S. E. 2d 404.

Caper, 215 N. C. 670, 2 S. E. 2d 864. "A motion in arrest of judgment can be based only on matters which appear on the face of the record proper, or on matters which should, but do not, appear on the face of the record proper. . . . The record proper in any action includes only those essential proceedings which are made of record by the law itself, and as such are self-preserving. . . . The evidence in a case is no part of the record proper. . . . In consequence, defects which appear only by the aid of evidence cannot be the subject of a motion in arrest of judgment." *State* v. *Gaston*, 236 N. C. 499, 501, 73 S. E. 2d 311, 313; *State* v. *Foster*, 228 N. C. 72, 44 S. E. 2d 447; *State* v. *Brown*, 218 N. C. 415, 422, 11 S. E. 2d 321, 325; *State* v. *McKnight*, 196 N. C. 259, 145 S. E. 281; *State* v. *Shemwell*, 180 N. C. 718, 721, 104 S. E. 885.

Examination of the whole course of North Carolina decisions thus precludes the inference that the Supreme Court of North Carolina in this case arbitrarily denied the appellants an opportunity to present their federal claim. The judgment before us for review is the judgment which the Supreme Court of North Carolina made on the record before it, not the action of the State trial court. "Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. *Callan* v. *Bransford*, 139 U. S. 197; *Brown* v. *Massachusetts*, 144 U. S. 573; *Jacobi* v. *Alabama*, 187 U. S. 133; *Hulbert* v. *Chicago*, 202 U. S. 275, 281; *Newman* v. *Gates*, 204 U. S. 89; *Chesapeake & Ohio Railway Co.* v. *McDonald*, 214 U. S. 191, 195." *John* v. *Paullin*, 231 U. S. 583, 585. "[W]hen as here there can be no pretence

that the [state] Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong." *Nickel* v. *Cole*, 256 U. S. 222, 225.[13]

A word of emphasis is appropriate, before concluding, to make entirely explicit what it is that is involved in this case, and what is not. There is no issue here as to the constitutional right of Negroes to use a public golf course free of racial discrimination. From first to last the courts of North Carolina fully recognized that under the Constitution these appellants could not be convicted if they were excluded from the golf course because of their race. The trial judge so instructed the jury, and the Supreme Court of North Carolina so held. Cf. *Constantian* v. *Anson County*, 244 N. C. 221, 93 S. E. 2d 163. Upon the evidence in this case the jury's verdict established that no such racial discrimination had in fact occurred. "On review here of State convictions, all those matters which are usually termed issues of fact are for conclusive deter-

[13] It has been suggested that even though the ground relied upon by the Supreme Court of North Carolina is an adequate state ground, this case should not be dismissed, but remanded because of a supervening "event." But there has been no significant "change either in fact or law, which has supervened since the judgment was entered" by the Supreme Court of North Carolina. *Patterson* v. *Alabama*, 294 U. S. 600, 607. All that has happened is that the State Attorney General's Office, at this Court's request after argument, made available a transcript of the trial court proceedings which was stated to be accurate. But it has not been suggested that the State at any time has questioned that the transcript of the trial court's proceedings would reflect that the documents had in fact been offered in evidence in the trial court. See note 9. This case thus does not involve a situation where there has been an intervening change in fact or law. Compare *Gulf, C. & S. F. R. Co.* v. *Dennis*, 224 U. S. 503; *Pagel* v. *MacLean*, 283 U. S. 266; *State Tax Comm'n* v. *Van Cott*, 306 U. S. 511, 515–516.

mination by the State courts and are not open for reconsideration by this Court. Observance of this restriction in our review of State courts calls for the utmost scruple." *Watts* v. *Indiana*, 338 U. S. 49, 50.

What is involved here is the assertion of a quite different constitutional claim—that the Supremacy Clause and the Fourteenth Amendment require a state criminal court to give conclusive effect to fact findings made in a civil action upon different evidence by a Federal District Court. While intimating no view as to the merits of this constitutional claim, we note only that it is a completely novel one. Cf. *Hoag* v. *New Jersey*, 356 U. S. 464, 470–471. The North Carolina Supreme Court did not decide this asserted federal question. We have found that it did not do so because of the requirements of rules of state procedural law within the Constitutional power of the States to define, and here clearly delineated and evenhandedly applied. We have no choice but to determine that this appeal must be dismissed because no federal question is before us. That determination is required by principles of judicial administration long settled in this Court, principles applicable alike to all litigants, irrespective of their race, color, politics, or religion.

Dismissed.

SUPREME COURT OF THE UNITED STATES

No. 7.—October Term, 1959.

Leon Wolfe, George Simkins, Jr., et al., Appellants, v. State of North Carolina. | On Appeal From the Supreme Court of North Carolina.

[June 27, 1960.]

Mr. Chief Justice Warren, with whom Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Brennan join, dissenting.

I do not agree that the decision below rests on adequate nonfederal grounds. And—whether it does or not—it seems to me that the case should not be dismissed in view of developments since the argument.

The crucial holding below is that the North Carolina courts could not consider the *Simkins*[1] record because appellants "for reasons best known to themselves elected not to offer [it] in evidence." 248 N. C., at 493, 103 S. E. 2d, at 852. It goes without saying that the procedural rule thus invoked—that appellants must rely on evidence which was offered at the trial—is, in itself, reasonable. In fact, that rule is elementary in most types of practice. The difficulty here lies not in the rule, but in its application to this case, on this record, and in the light of the fact, acknowledged by the State,[2] that appellants offered the *Simkins* record in evidence.

The relevant facts are few. When the federal court granted its injunction in *Simkins*, it found that appellants had been excluded from Gillespie Park on the occasion in

[1] *Simkins* v. *City of Greensboro*, 149 F. Supp. 562, affirmed, *City of Greensboro* v. *Simkins*, 246 F. 2d 425.

[2] The State has stipulated to the accuracy of a stenographic trial transcript made available to the Court, after argument, at the Court's request. See the Court's opinion, note 9. Of course, the State denies that the transcript has any relevance to the issues before the Court

question because they are Negroes. *Simkins* v. *City of Greensboro*, 149 F. Supp. 562, 565. As was held below such exclusion, if established as a fact in *this* case, would be a complete defense to the State's trespass charge. 248 N. C., at 491–493, 103 S. E. 2d, at 851–852. Therefore, appellants offered the *Simkins* record in evidence during their trial.[3] They claimed under the Supremacy Clause and the Fourteenth Amendment, that the federal court determination barred the state prosecution. However, the State objected to appellants' offer of proof, and the trial court sustained the objection.[4] Thereafter, the jury convicted.

On appeal to the Supreme Court of North Carolina, appellants sought review of their contention that the federal court findings were binding on the State in the subsequent criminal proceedings. At this point they made the mistake which deprived them of the opportunity to have that federal question reviewed. They failed to include their offer of proof and the rejected exhibits in their case on appeal, although they did include the ruling on the State's objection. With the resulting defective record before it, the State Supreme Court held that it could not review appellants' federal question because, as has been indicated, appellants "for reasons best known to themselves elected not to offer [the *Simkins* record] in evidence."

The Court holds that the state ground is adequate to support the decision below because, although we know the fact to be to the contrary, the assertion that appellants failed to offer the *Simkins* record in evidence "is borne out by the record" which the state court had before it. I cannot read that record—appellants' case on appeal—as does the Court. Therefore, I do not agree

[3] See the Court's opinion, notes 8, 9.

[4] See the Court's opinion, note 8.

that the state ground is adequate. But even if it were, it does not follow that the case must—or should—be dismissed. Rather, the State's stipulation—a supervening event which may be of critical significance under North Carolina law—requires a different disposition, in the interests of justice, under controlling precedent.

First. It cannot be said, even on the defective record which the State Supreme Court had before it, that appellants "for reasons best known to themselves elected not to offer [the *Simkins* record] in evidence." On the contrary, appellants' case on appeal indicates clearly that appellants offered the *Simkins* record in evidence. When the portions of that record set out in the Court's opinion [3] are read as a whole with the entire case on appeal, it seems reasonably clear that the *Simkins* record was offered in evidence, that the State objected to the offer, and that the objection was sustained. Therefore, whether the result below could have been based on other grounds or not, the factual premise for the ground on which it *was* based lacks fair and substantial support in the record. *That* ground, therefore, is not adequate. Cf. *Creswill* v. *Grand Lodge*, 225 U. S. 246; *Union Pacific R. Co.* v. *Public Service Comm'n*, 248 U. S. 67; *Cedar Rapids Gas Light Co.* v. *Cedar Rapids*, 223 U. S. 655; see *United Gas Co.* v. *Texas*, 303 U. S. 123, 143. "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis* v. *Wechsler*, 263 U. S. 22, 24. Since the *only* state ground mentioned in the opinion below is inadequate, this Court should either proceed directly to a consideration of the federal question or—if deemed desirable—should remand the case to the state court for further consideration.

[3] See the Court's opinion, note 8.

Second. Even if the state ground were adequate, the case should not be dismissed. After the argument in this Court, the State furnished the Court with a copy of the actual stenographic transcript of the trial. The State stipulated to the accuracy of that transcript. The transcript shows, beyond peradventure, that the decision below was based "upon a supposed state of facts which does not exist." *Gorham* v. *Pacific Mut. Life Ins. Co.*, 215 N. C. 195, 200, 1 S. E. 2d 569, 572. The North Carolina court apparently recognizes infirmity in its decisions in such cases. *State* v. *Marsh*, 134 N. C. 184, 47 S. E. 6. Therefore, the State's stipulation, an event "which has supervened since the judgment [below] was entered," may very well "affect the result." *Patterson* v. *Alabama*, 294 U. S. 600, 607. Accordingly, under firmly established principles, the case should either be remanded for a decision by the state court on the legal effect of the State's stipulation,[6] or we should decide this question of state law ourselves.[7] To take such action "is not to review, in any proper sense of the term, the decision of the state court upon a nonfederal question, but only to deal appropriately with a matter arising since its judgment and having a bearing upon the right disposition of the case." *Patterson* v. *Alabama*, *supra*, at 607; *State Tax Comm'n* v. *Van Cott*, 306 U. S. 511, 515–516.

Third. It should not be assumed that *other* state grounds, not relied on below, would preclude reconsideration by the state court if the case were remanded. As has been indicated, the State's stipulation may create infir-

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[6] *Gulf, C. & S. F. R. Co.* v. *Dennis*, 224 U. S. 503; *Pagel* v. *MacLean*, 283 U. S. 266; *Patterson* v. *Alabama*, *supra*; *State Tax Comm'n* v. *Van Cott*, 306 U. S. 511; *New York ex rel. Whitman* v. *Wilson*, 318 U. S. 688; *Ashcraft* v. *Tennessee*, 322 U. S. 143, 155–156; *Williams* v. *Georgia*, 349 U. S. 375.

[7] *Missouri ex rel. Wabash R. Co.* v. *Public Service Comm'n*, 273 U. S. 126; *Steamship Co.* v. *Joliffe*, 2 Wall. 450.

mity in the state court's decision, under North Carolina law. See *State* v. *Marsh, supra.* A remaining obstacle to appellate review of appellants' federal question, under North Carolina practice, may be the omission of the rejected exhibits from appellants' case on appeal. See *In re Smith's Will,* 163 N. C. 465, 79 S. E. 977. But records can be corrected. The Court refers us to cases which show that the North Carolina court may permit corrections in the record proper [8] and in the case on appeal.[9] It may authorize corrections not only when fault is attributable to the lower court,[10] but also when it is chargeable to the parties.[11] It may do so pursuant to agreement between the parties [12] and pursuant to motion of one of the parties.[13] Indeed, it appears that it may

[8] *State* v. *Mosley,* 212 N. C. 766, 194 S. E. 486; *State* v. *Brown,* 203 N. C. 513, 166 S. E. 396; *State* v. *Marsh, supra; State* v. *Daniel,* 121 N. C. 574, 28 S. E. 255; *State* v. *Farrar,* 103 N. C. 411, 9 S. E. 449, 104 N. C. 702, 10 S. E. 159; *State* v. *Butts,* 91 N. C. 524; cf. *Aycock* v. *Richardson,* 247 N. C. 233, 100 S. E. 2d 379; *Mason* v. *Moore County Board,* 229 N. C. 626, 51 S. E. 2d 6.

[9] *Cameron* v. *Power Co.,* 137 N. C. 99, 49 S. E. 76; *Arnold* v. *Dennis,* 131 N. C. 114, 42 S. E. 552; *Sherrill* v. *Western Union Tel. Co.,* 116 N. C. 654, 21 S. E. 400; *Broadwell* v. *Ray,* 111 N. C. 457, 16 S. E. 408; *Lowe* v. *Elliott,* 107 N. C. 718, 12 S. E. 383; cf. *Aycock* v. *Richardson,* 247 N. C. 233, 100 S. E. 2d 379; *Mason* v. *Moore County Board,* 229 N. C. 626, 51 S. E. 2d 6.

[10] *Cameron* v. *Power Co.,* 137 N. C. 99, 49 S. E. 76; *Sherrill* v. *Western Union Tel. Co.,* 116 N. C. 654, 21 S. E. 400; *Broadwell* v. *Ray,* 111 N. C. 457, 16 S. E. 408; *State* v. *Daniel,* 121 N. C. 574, 28 S. E. 255.

[11] *Arnold* v. *Dennis,* 131 N. C. 114, 42 S. E. 552; *State* v. *Daniel,* 121 N. C. 574, 28 S. E. 255.

[12] *Smith* v. *Capital Coca-Cola Bottling Co.,* 221 N. C. 202, 19 S. E. 2d 626; *Gorham* v. *Pacific Mut. Life Ins. Co., supra; Miller* v. *Scott,* 185 N. C. 93, 116 S. E. 86.

[13] *State* v. *Mosley,* 212 N. C. 766, 194 S. E. 486; *State* v. *Brown,* 203 N. C. 513, 166 S. E. 396; *Cameron* v. *Power Co.,* 137 N. C. 99, 49 S. E. 76; *State* v. *Marsh, supra; Sherrill* v. *Western Union Tel. Co.,* 116 N. C. 654, 21 S. E. 400; *Broadwell* v. *Ray,* 111 N. C. 457, 16 S. E. 408.

be able to do so on its own motion.[14] Its power to inquire into the accuracy of the record before it is established—to some extent at least—by recent decisions,[15] and its power to order the lower courts to send up "additional papers and parts of the record" is explicitly recognized by its rules.[16] Therefore, the state court *could* permit a correction of the record—and consequently could decide the federal question—if the case were remanded.

It is true that there is language in North Carolina cases, to which the State has called our attention, that indicates that a record settled by agreement—rather than by the trial court—may only be corrected by agreement. See *Smith* v. *Capital Coca-Cola Bottling Co.*, 221 N. C. 202, 19 S. E. 2d 626; *Gorham* v. *Pacific Mut. Life Ins. Co.*, *supra*. And language from *State* v. *Dee*, 214 N. C. 509, 512, 199 S. E. 730, 732, quoted by the Court in another connection, suggests that the state court is disinclined to permit the correction of a defective record when the case on appeal is settled by the parties. But these cases are not in point in the circumstances of the case before us.

The rule stated in *Smith* and *Gorham*—that a record settled by agreement can only be corrected by agreement—is subject to a very relevant qualification. For in *Gorham*, the North Carolina court observed, in denying

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[14] See *Aycock* v. *Richardson*, 247 N. C. 233, 100 S. E. 2d 379; *Mason* v. *Moore County Board*, 229 N. C. 626, 51 S. E. 2d 6; *State* v. *Butts*, 91 N. C. 524; *State* v. *Daniel*, 121 N. C. 574, 28 S. E. 255; *State* v. *Farrar*, 103 N. C. 411, 9 S. E. 449, 104 N. C. 702, 10 S. E. 159.

[15] *Aycock* v. *Richardson*, 247 N. C. 233, 100 S. E. 2d 379; *Mason* v. *Moore County Board*, 229 N. C. 626, 51 S. E. 2d 6.

[16] N. C. S. C. Rule 19 (1). Rule 19 (1) sets out the requirements as to form and content of transcripts on appeal. After setting out these requirements, it recites: "Provided, further, that this rule is subject to the power of this Court to order additional papers and parts of the record to be sent up."

a losing party's request for a certiorari to correct the record, that:

> "[T]here is no concession on the part of the [prevailing party] that the case has been decided 'upon a sham issue,' or 'upon a supposed state of facts which does not exist, nor yet upon a misconception of the record. *Cook* v. *Mfg. Co.*, [183 N. C. 48, 110 S. E. 608]; *S.* v. *Marsh*, [*supra*]. These are allegations of the [losing party], and [the prevailing party] says they rest only in allegation. She further says that the interpretation placed upon the record 'was and is absolutely correct'; . . . and that the transcript admits of no other interpretation." 215 N. C., at 200, 1 S. E. 2d, at 572.

Here, on the other hand, the State has stipulated to facts which *do* establish that the case was decided below "upon a supposed state of facts which does not exist." That is precisely what the prevailing party in *Gorham* did not concede. This case, therefore, is governed by *Cook* and *Marsh*, not by *Gorham*.

Likewise, in *Dee*, the North Carolina court denied the State's request for a certiorari to correct an alleged error in the case on appeal. But in *Dee*, as in *Gorham*, the prevailing party did not concede that there was any error in the record. In fact, the court itself expressed skepticism about the State's claim:

> "It is suggested by the Attorney-General that, in all probability, a typographical error has crept into the transcript and that the word 'disinterested' was used where the word 'interested' appears. In this he is supported by a letter from the judge who presided at the trial, and upon this letter a motion for *certiorari* to correct the record has been lodged on behalf of the State. The solicitor apparently took a dif-

ferent view of the matter when he agreed to the statement of case on appeal with an exception pointed directly to the expression." 214 N. C., at 512, 199 S. E., at 732.

On these facts, quite different from those before us, it is perhaps understandable that the state court refused to entertain the State's appeal to its discretion.

Therefore, it appears that if the case were remanded, appellants would very likely be permitted to correct their case on appeal, in view of the State's stipulation. And, as has been indicated, a correction could now be allowed even if the State objected to it. But I am sure that the State would not object, for North Carolina has no interest in depriving its citizens of their liberty on assumptions that do not accord with fact. It seems clear, therefore, that under North Carolina law, appellants may yet have their federal question reviewed—unless we dismiss.[12]

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[12] Under my view of the case, it is unnecessary to decide whether the North Carolina court's broad powers with respect to the record, and the evidence of their frequent exercise in the interests of justice, see notes 8–16, *supra*, are consistent with the Court's rejection of appellants' argument, based on *Williams* v. *Georgia*, 349 U. S. 375, that the North Carolina court should have gone outside the record to get at the truth as it has in some other cases. *E. g.*, *Aycock* v. *Richardson*, 247 N. C. 233, 100 S. E. 2d 379.

However, it may be worth noting in this connection that there is no relevant distinction between criminal cases like this one and civil cases like *Aycock*. Cf. the Court's opinion, note 10. The same statute, said to limit the power of the state court to go outside the record, see *State* v. *Dee*, *supra*, at 512, 199 S. E., at 732 (quoted by the Court), is equally applicable to either type of case. Likewise, the apparently inflexible rule stated in the criminal cases cited by the Court is also stated in numerous civil cases. See, as representative, *Hagan* v. *Jenkins*, 234 N. C. 425, 67 S. E. 2d 380; *Bame* v. *Palmer Stone Works*, 232 N. C. 267, 59 S. E. 2d 812. The same precedents are applicable in both types of case. See, for example, *Bame* v. *Palmer Stone Works*, *supra*, and conversely, the *Dee* and *Weaver* cases.

In view of the federal court finding that the appellants were excluded from Gillespie Park because of their race, these convictions give rise to serious constitutional doubts. Unless dismissal cannot be avoided, the appellants should not be deprived of their liberty without being heard on their federal question. Our own precedents require that we either remand the case or decide the questions which it presents.

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cited by the Court. Therefore, if the rule stated in the criminal decisions relied on by the Court is as inflexible as it purports to be, it should be equally so in civil cases. Yet *Aycock* shows that the rule is less rigid in fact than in articulation.

The Court also distinguishes *Aycock* because there the state court went outside the record to verify an apparent lack of jurisdiction. See the Court's opinion, note 11. However, so far as has been called to our attention, the North Carolina court has never suggested such a distinction. It would seem more logical, therefore, to assume that if the state court can go outside the record where it apparently lacks jurisdiction, it can do so where its jurisdiction is clear.